(17,022.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1899.

No. 150.

HENRY F. WHITCOMB AND HOWARD MORRIS, AS RECEIVERS OF THE WISCONSIN CENTRAL COMPANY, PLAINTIFFS IN ERROR,

vs.

JOHN A. SMITHSON.

IN ERROR TO THE SUPREME COURT OF THE STATE OF MINNESOTA.

INDEX.

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., JUNE 14, 1899.

a STATE OF MINNESOTA, } ss:
Ramsey County, }

Charles M. Morris, being duly sworn, says that he is a resident of Milwaukee, in the State of Wisconsin; that he did, at the city of St. Paul, in the county of Ramsey, in the State of Minnesota, on the 30th day of September, A. D. 1898, duly serve the citation hereto annexed upon J. F. George, Esq., who is one of the attorneys for the defendant in error, John A. Smithson, therein named, in the manner following, to wit: The said J. F. George was not in his office, and deponent therefore then and there, to wit, at the office of said George, left a true and correct copy of the said citation with Alice Corcoran, who was then and there the clerk in charge of the office of the said J. F. George, and to whom deponent then and there explained the character and contents of said paper; that said service was made at 11.30 o'clock in the forenoon of the day aforesaid.

CHARLES M. MORRIS.

Subscribed and sworn to before me this 30th day of September, A. D. 1898.

[Seal of the Supreme Court, State of Minnesota.]

J. L. HELM,
Deputy Clerk of Supreme Court.

b UNITED STATES OF AMERICA, ss:

The President of the United States to John A. Smithson, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, to be holden in Washington, in the District of Columbia, on the 10th day of October, A. D. 1898, pursuant to a writ of error filed in the clerk's office of the supreme court of the State of Minnesota, wherein Henry F. Whitcomb and Howard Morris, as receivers of the Wisconsin Central Company, are plaintiffs in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiffs in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Charles M. Start, chief justice of the supreme court of the State of Minnesota, this 30th day of September, in the year of our Lord one thousand eight hundred and ninety-eight.

CHAS. M. START,
Chief Justice Supreme Court of Minnesota.

c [Endorsed:] Supreme Court of the United States. H. F. Whitcomb *et al.*, receivers, etc., pl'ffs in error, *vs.* John A. Smithson, def't in error. Citation. Original.

d UNITED STATES OF AMERICA, *ss:*

Supreme Court.

The United States of America to the judges of the supreme court of the State of Minnesota, Greeting:

Because in the record and proceedings and also in the rendition of judgment in a suit which was duly tried in the supreme court of the State of Minnesota aforesaid, before you, between Henry F. Whitcomb and Howard Morris, as receivers of the Wisconsin Central Company, defendants and appellants, and John A. Smithson, plaintiff and respondent, in an action of tort, manifest error hath intervened, to the great damage of the said Henry F. Whitcomb and Howard Morris, as receivers as aforesaid, as by their petition we are informed, and we, being willing that the error, if any there be, should in due manner be corrected and full and speedy justice done to the parties aforesaid, do command you that, if judgment be thereupon given, then you send to the judges of the Supreme Court of the United States, distinctly and openly, under your seal, with all convenient dispatch, a transcript of the record and proceedings of the suit aforesaid, with all things concerning the same, and this writ, so that they may have the same at the next term of our said Supreme Court, to be held at Washington, in the District of Columbia, on the tenth day of October, in the year of our Lord one thousand eight hundred and ninety-eight, that, the record and proceedings aforesaid being inspected, we may cause further to be done for correcting that error what of right and according to law and the rules of our said court ought to be done.

e Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this 30th day of September, A. D. 1898, and of the Independence of the United States the one hundred & twenty-third.

[Seal U. S. Circuit Court, Dist. of Minnesota, Third Division.]

HENRY D. LANG,
Clerk United States Circuit Court, District of Minnesota.

Allowed by—

CHAS. M. START,
Chief Justice of the Supreme Court of the State of Minnesota.

f [Endorsed:] Supreme Court of the United States. H. F. Whitcomb *et al.*, receivers, etc., pl'ffs in error, *vs.* John A. Smithson, def't in error. Writ of error. Original.

g Supreme Court of the United States.

HENRY F. WHITCOMB & HOWARD MORRIS, as Receivers of the Wisconsin Central Company, Plaintiffs in Error,
vs.
JOHN A. SMITHSON, Defendant in Error.

The petition of the above-named Henry F. Whitcomb and Howard Morris, as receivers of the Wisconsin Central Company, respectfully shows:

First. That heretofore and on or about the 2nd day of October, A. D. 1895, the above-named John A. Smithson, as plaintiff, brought his action in the district court of Ramsey county, in the State of Minnesota, by service of summons and complaint against the above-named Whitcomb and Morris, as receivers as aforesaid, and The Chicago, Great Western Railway Company, a corporation under the laws of the State of Illinois, as joint defendants, to recover the sum of twenty-five thousand dollars ($25,000) for personal injuries suffered by said Smithson because of the alleged carelessness, negligence, and default of the said Whitcomb and Morris, receivers as aforesaid, or their agents and servants, while operating the line of railroad of the Wisconsin Central Company as such receivers, as more fully appears by the verified complaint in said action.

Second. That the injuries to recover for which said action was brought occurred upon a line of railway used in common by the said receivers and the Chicago Great Western Railway Company, a corporation under the laws of the State of Illinois, for whom
h at the time of said injuries the said Smithson was engaged as a servant, and occurred in the city of Chicago and State of Illinois on the 7th day of March, A. D. 1894.

Third. That on the 22nd day of October, A. D. 1895, and within the time limited by law for the defendants in said action to appear and plead to the complaint therein, the said Whitcomb and Morris, as receivers as aforesaid, filed in said district court for Ramsey county, Minnesota, accompanied by a proper bond, their petition for the removal of said action into the United States circuit court for the district of Minnesota in accordance with and pursuant to the provisions of the acts of Congress in such behalf made and provided.

That the said petition for removal was based upon the allegation of diverse citizenship between said receivers, who were citizens and residents of the State of Wisconsin, and the said Smithson, who was a citizen and resident of the State of Minnesota, and because a separable controversy existed in said matter as between said receivers and said Smithson, to the proper consideration and determination of which the said Chicago Great Western Railway Company was not a necessary or proper party, and because the said Chicago Great Western Railway Company had been made a party defendant in said action by said Smithson fraudulently and for the sole purpose of preventing a removal by said receivers of said action to the said United States circuit court. Said right to remove was also

claimed therein because of the appointment of said receivers by the United States circuit court for the eastern and western districts of Wisconsin and for the district of Minnesota, and because said action was brought against said receivers for their alleged negligence under and by virtue of their said appointment, and was brought
i in said State court without the leave of the Federal court so appointing said receivers and by virtue of the acts of Congress in such case made and provided.

Said Chicago Great Western Railway Company did not join in or present any petition for removal, but duly answered in said action in such State court.

Fourth. That said bond on removal was approved by the State court and a transcript of the record in said action therein duly sent to and docketed in the circuit court of the United States for the district of Minnesota, and that said plaintiff, Smithson, appeared in said United States circuit court, and, answering said petition for removal, denying collusion and fraud to prevent removal, moved to remand said action to said State court, and, after a hearing upon said motion, the said circuit court of the United States for the district of Minnesota, by Nelson, district judge, on the 6th day of February, 1896, granted the motion to remand "on authority of Thompson *vs.* C., St. P. & K. C. R'y Co. and C., M. & St. P. R'y Co. (60 Fed., 773)." The case thus referred to was remanded for the reason that there was no separable controversy.

Fifth. That thereafter and on the 4th day of June, A. D. 1896, the defendants, receivers, being in default in said State court for want of an answer, stipulated in writing with the attorneys for the plaintiff Smithson that in consideration of waiving said default and permitting the said defendants, receivers, to answer therein, the said cause should be tried at the June term of said State court, 1896, "and in case of final judgment in said action in favor of said plaintiff and against said receivers, that the said receivers would not oppose the allowance thereof before the master in chancery" in the original equity case in which the said receivers had been appointed.

j The defendants, receivers, thereupon answered in said State court, and after various delays the said action was tried therein, resulting in a directed verdict in favor of said defendant, Chicago Great Western Railway Company, upon the ground that no cause of action had been stated against it, and a judgment in favor of the plaintiff and against the defendants, receivers, for the sum of twelve thousand five hundred dollars ($12,500) and costs; that throughout said action, in the manner prescribed and sanctioned by the law and practice of the State of Minnesota, the defendants, receivers, objected to the trial of said action in said State court for the reason that the State court had no jurisdiction thereof, but that jurisdiction had been taken by and had remained in the said circuit court of the United States for the district of Minnesota.

Sixth. At the close of all the evidence given on the trial in said State court, after the direction of a verdict of no cause of action as against the Chicago Great Western Railway Company, and at the

first opportunity in said State court when the said action had become one only against the receivers, defendants, said receivers, upon proper bond and petition then tendered to said court, asked for the removal thereof from said State court to the said circuit court of the United States for the district of Minnesota; but said petition for removal was denied for the reason that the presentation thereof was too late to accomplish a removal, and said action in said court proceeded to judgment as aforesaid.

Seventh. That after the rendition of said judgment in said State court, and within the proper time, the said defendants, receivers, in the method authorized by the laws of the State of Minnesota, duly prosecuted an appeal from said judgment of said district court of Ramsey county, Minnesota, to the supreme court of the State of Minnesota, and proceedings were therein had and a hearing and arguments made in said action before said court and an opinion therein rendered affirming the said judgment and denying the right of the said receivers to remove said action, as originally attempted in said district court and as thereafter sought during the trial of said action in said district court, as hereinbefore set out; that the affirmance of said judgment by said supreme court of the State of Minnesota was in the court of last resort in said State, and that thereby there was denied to the defendant receivers a right, immunity, privilege, and authority set up and claimed under and by virtue of the laws of the United States, and that said judgment is a final judgment by the highest court of the said State of Minnesota in which a decision of such question could be had, and is a good and valid judgment as said decision of said court, unless the same shall be here modified or reversed.

Wherefore the said Henry F. Whitcomb and Howard Morris, as receivers as aforesaid, pray that a writ of error may be allowed in said action, directed to the honorable the judges of the supreme court of the State of Minnesota, commanding them, under their seal, distinctly and openly, to send the record and proceedings in said cause, with all things concerning the same, to the Supreme Court of the United States, and that, said record being properly inspected, the said Supreme Court of the United States may cause further to be done therein to correct any error, and to do what of right and according to the laws and customs of the United States should be done.

H. F. WHITCOMB,
HOWARD MORRIS,
Receivers of the Wisconsin Central Company.
HOWARD MORRIS &
THOS. H. GILL,
Attorney for Petitioners.

STATE OF WISCONSIN, } ss:
Milwaukee County, }

Thos. H. Gill, being first duly sworn, deposes and says that he is attorney for the receivers, plaintiffs in error in the above-entitled action, and makes this verification for and in their behalf, being

thereunto duly authorized; that he knows the contents of the foregoing petition, and that the same is true to his own knowledge. Deponent further says that the reason why this verification is not made by said receivers is that said receivers are nor nor is either of them within the State of Wisconsin or the State of Minnesota, and therefore cannot make this affidavit.

THOS. H. GILL.

Subscribed and sworn to before me this 29th day of September, A. D. 1898.

EDGAR C. HOE,
[NOTARIAL SEAL.] *Notary Public, Milwaukee County, Wisconsin.*

m On reading the foregoing petition and the accompanying bond, the said bond is approved and the writ prayed for is hereby allowed this 30 day of September, A. D. 1898.

CHAS. M. START,
Chief Justice Supreme Court of Minnesota.

n [Endorsed:] Supreme Court of the United States. H. F. Whitcomb *et al.*, receivers, etc., pl'ffs in error, *vs.* John A. Smithson, def't in error. Petition of H. F. Whitcomb *et al.*, receivers, etc., for writ of error. Copy.

Endorsed: Filed Oct. 1, 1898. Darius F. Reese, clerk.

o Supreme Court of the United States.

HENRY F. WHITCOMB and HOWARD MORRIS, as Receivers of the Wisconsin Central Company, Plaintiffs in Error,
vs.
JOHN A. SMITHSON, Defendant in Error.

Assignment of Errors.

And now come the said H. F. Whitcomb and Howard Morris, as receivers as aforesaid, plaintiffs in error above named, and assign the following errors in said cause:

1st. The State court erred in assuming jurisdiction of the parties and subject-matter of this action upon remand from the United States circuit court for the district of Minnesota, third division.

2nd. The State court erred in denying the motion of the defendant receivers, the plaintiffs in error here, for permission to file an amended answer therein, pleading to the jurisdiction of said court.

3rd. The State court erred in overruling the objections of the defendant receivers, plaintiffs in error here, to the jurisdiction of said court to hear, try, and determine this action.

4th. The State court erred in denying defendant receivers' motion upon their proper petition and bond for the removal of this
p action to the United States circuit court for the district of Minnesota, third division, presented immediately following

the dismissal of the cause of action as against the Chicago Great Western Railway Company at the close of the plaintiff's case.

5th. Said State court did err in exercising jurisdiction in said cause and in trying and determining the same and rendering judgment therein, in that it denied to the defendants therein, the plaintiffs in error here, the right, privilege, and immunity specially set up therein, under the statute and authority of the United States, of their removal of and their right to remove said cause from said State court into said circuit court of the United States.

Wherefore plaintiffs in error here respectfully pray that said judgment of the supreme court of the State of Minnesota may be reversed.

HOWARD MORRIS &
THOS. H. GILL,
Attorneys for Plaintiffs in Error.

q [Endorsed:] Supreme Court of the United States. H. F. Whitcomb *et al.*, receivers, etc., pl'ffs in error, *vs.* John A. Smithson, def't in error. Assignment of errors. Copy.
Endorsed: Filed Oct. 1, 1898. Darius F. Reese, clerk.

r State of Minnesota, department of insurance.

ST. PAUL, MINN., *Sept.* 30, 1898.

I, Elmer H. Dearth, insurance commissioner of the State of Minnesota, do hereby certify that the National Surety Company of New York is a corporation organized under the laws of the State of New York, and is authorized under its charter to guarantee the fidelity of persons holding places of public or private trust; to guarantee the performance of contracts other than insurance policies, and to execute and guarantee bonds and undertakings required or permitted in actions and proceedings at law; that it appears to my satisfaction, from sufficient evidence on file in my office of commissioner of insurance of said State of Minnesota, that said corporation, the National Surety Company of New York, has furnished the same security which is required by law and the regulations of my department of life insurance companies, under the provisions of sections 355 to 358, inclusive, of chapter 34, General Laws of the State of Minnesota of one thousand eight hundred and seventy-eight (1878).

In witness whereof I have hereunto set my hand and affixed my official seal the day and year first above written.

[SEAL.] ELMER H. DEARTH,
Insurance Commissioner.

s Supreme Court of the United States.

HENRY F. WHITCOMB and HOWARD MORRIS, as Receivers of the Wisconsin Central Company, Plaintiffs in Error,
vs.
JOHN A. SMITHSON, Defendant in Error.

Know all men by these presents that we, H. F. Whitcomb and Howard Morris, as receivers of the Wisconsin Central Company, as

principals, and National Surety Company of New York, in the State of New York, as surety, are held and firmly bound unto John A. Smithson, of —— county, Minnesota, in the full and just sum of one thousand dollars, to be paid to the said John A. Smithson, his certain attorney, executors, administrators, or assigns; to which payment, well and truly to be made, we do hereby bind ourselves as such receivers, our successor or successors and assigns, jointly and severally, firmly by these presents.

Sealed with our seals and dated this 28 day of September, in the year of our Lord one thousand eight hundred and ninety-eight.

Whereas lately, at a session of the supreme court of the State of Minnesota, in a suit depending in said court between John A. Smithson, plaintiff and respondent therein, and the said Henry F. Whitcomb and Howard Morris, receivers of the Wisconsin Central Company, defendants and appellants therein, a final judgment was rendered against the said Henry F. Whitcomb and Howard
t Morris, as receivers, as aforesaid, and the said Henry F. Whitcomb and Howard Morris, as receivers, as aforesaid, having obtained a writ of error to the Supreme Court of the United States and filed a copy thereof in the clerk's office of the said court to reverse the said judgment in the aforesaid court, and a citation directed to the said John A. Smithson, citing and admonishing him to be and appear at the Supreme Court of the United States to be holden at Washington, in the District of Columbia, on the 10th day of October, in the year of our Lord one thousand eight hundred and ninety-eight:

Now, the condition of the above obligation is such that if the said Henry F. Whitcomb and Howard Morris, as receivers of the Wisconsin Central Company, shall prosecute their said writ of error to effect and answer all costs, not exceeding the sum of one thousand dollars, if they fail to make good their said plea that may be awarded against them, then the above obligation shall be void; otherwise to be and remain in full force and effect.

H. F. WHITCOMB, [SEAL.]
HOWARD MORRIS, [SEAL.]
Receivers Wisconsin Central Company,
By THOMAS H. GILL, *Their Attorney.*
NATIONAL SURETY COMPANY,
By KENNETH CLARK, [SEAL.]
Resident Vice-President.
Attest: W. B. JOYCE, *Resident Ass't Secretary.*

In presence of—
CHARLES M. MORRIS.
L. F. HOLCOMBE.
CHARLES M. MORRIS.

u STATE OF MINNESOTA, } ss:
County of Ramsey, }

On this 30th day of September, 1898, before me personally appeared William B. Joyce, resident assistant secretary of the National Surety

Company, the above-named corporation, with whom I am personally acquainted, who, being by me duly sworn, said that he resides in the city of St. Paul; that he is resident assistant secretary of said corporation, the National Surety Company; that he knows the corporate seal of said corporation; that the seal affixed to the foregoing instrument is the corporate seal; that it was affixed by order of the board of directors of said corporation, and that he signed said instrument as resident assistant secretary of said corporation by like authority; and the said William B. Joyce further said that he is acquainted with Kenneth Clark, and knows him to be resident vice-president of said company; that the signature of said Kenneth Clark subscribed to the said instrument is the genuine handwriting of the said Kenneth Clark, and was thereto subscribed by the like order of the said board of directors and in the presence of him, the said William B. Joyce, resident assistant secretary, and the said William B. Joyce acknowledged said instrument to be the free act and deed of said corporation.

L. F. HOLCOMBE,

[SEAL.] *Notary Public, Ramsey County, Minnesota.*

v [Endorsed:] Supreme Court of the United States. H. F. Whitcomb *et al.*, receivers, etc., pl'ffs in error, *vs.* John A. Smithson, def't in error. Bond. The within bond is approved as one for costs, but is not to operate as a supersedeas bond. Chas. M. Start, chief justice, supreme court of Minnesota.

Endorsed: Copy. Filed Oct. 1, 1898. Darius F. Reese, clerk.

1 STATE OF MINNESOTA:

Supreme Court, October Term, A. D. 1897.

STATE OF MINNESOTA, }
County of Ramsey. }

District Court, Second Judicial District.

JOHN SMITHSON, Plaintiff,
vs.
THE CHICAGO, GREAT WESTERN RAILWAY COMPANY and H. F. Whitcomb and Howard Morris, Receivers of the Wisconsin Central Company, Defendants.

Summons.

The State of Minnesota to the above-named defendants:

You and each of you are hereby summoned and required to answer the complaint in this action, which is hereto attached and herewith served upon you, and to serve a copy of your answer to the said complaint on the subscribers, at their office in St. Paul, Ramsey county, Minnesota, within twenty days after the service of this summons upon you, exclusive of the day of such service,

2 and if you fail to answer the complaint within the time aforesaid, the plaintiff in this action will have the amount he is

entitled to recover ascertained by the court, or under its direction, and take judgment for the amount so ascertained.

JOHN A. LOVELY,
J. F. GEORGE,
Attorneys for Plaintiff, 30 *Gilfillan Block*,
St. Paul, Minnesota.

STATE OF MINNESOTA:

In District Court, County of Ramsey, Second Judicial District.

JOHN SMITHSON, Plaintiff,
vs.
THE CHICAGO, GREAT WESTERN RAILWAY COMPANY and H. F. Whitcomb and Howard Morris, Receivers of the Wisconsin Central Company, Defendants.

Complaint.

Now comes the above-named plaintiff and complains of the above-named defendants in civil action — for cause thereof alleges:

(1.) That at all the dates and times herein mentioned, the defendant, The Chicago, Great Western Railway Company, was and
3 still is a corporation duly created, organized and existing under and by virtue of the laws of the State of Illinois, and doing business under the corporate name of the Chicago, Great Western Railway Company and was at all of said times in conjunction with the defendants H. F. Whitcomb and Howard Morris (receivers as hereinafter stated) maintaining and operating a railroad, yard and track within the county of Cook and State of Illinois.

(2.) That at all the dates and times hereinafter mentioned the Wisconsin Central Railroad Company was and still is a railroad corporation of the State of Wisconsin duly created, organized and existing under and by virtue of the laws thereof, and previous to the appointment of the said H. F. Whitcomb and Howard Morris, receivers, was engaged as such corporation in the business of common carrier operating its said line of road from the city of Chicago in the State of Illinois through the State of Wisconsin to the city of St. Paul in the State of Minnesota.

(3.) That at all the dates and times hereinafter mentioned the Wisconsin Central Company was and still is a corporation of the State of Minnesota duly created, organized and existing under and by virtue of the laws thereof; and was at said times and still is a corporation of the State of Wisconsin duly created, organized and existing under and by virtue of the laws thereof, and that previous to the appointment of the said H. F. Whitcomb and Howard
4 Morris, receivers, was engaged as such corporation in the business of common carrier, operating its said line of road from the city of Chicago in the State of Illinois through the State of Wisconsin to the city of St. Paul in the State of Minnesota.

(4.) That at and prior to the time of the appointment of the said defendants receivers of said companies as hereinafter set forth, the

said Wisconsin Central Company and the said Wisconsin Central Railroad Company above mentioned and described were operating certain other corporations and connections between the said city of Chicago through the said State of Wisconsin to the city of St. Paul in the said State of Minnesota, and that the said corporations so operated in connection with each other, were run, operated and conducted under the system, name and style of the Wisconsin Central lines, and that said system at the time of the appointment of said receivers as aforesaid, was doing a large traffic business between said city of Chicago and said city of St. Paul, and employed a large number of agents and servants and operated a large number of locomotives and trains of cars.

(5.) That prior to the time of the injury and damage hereinafter set forth, the said Wisconsin Central Company and the said Wisconsin Central Railroad Company, their affairs, business, franchises and properties and all the business of the said Wisconsin Central lines were by the United States circuit court in and for the
5 district of Minnesota, third division, and by the United States circuit court in and for the eastern district of Wisconsin and by the orders of said courts, then and there having jurisdiction in the premises, placed in the hands of receivers, and by said orders the said defendants H. F. Whitcomb and Howard Morris were, ever since have been and now are in possession of said railroads, properties and franchises as such receivers and under the order and direction of said courts were, at all the times hereinafter stated running and operating said railroads under the name of the Wisconsin Central lines and doing the business and conducting all their affairs and maintained all the rights and franchises of said companies, and employed a large number of servants and agents and maintained and operated a large number of locomotives and trains of cars in and about said business.

(6.) That heretofore, to wit: on or about the 3rd day of March, A. D. 1892, said plaintiff was a servant in the employ of the said defendant, The Chicago, Great Western Railway Company and remained and continued in the said service in the capacity of fireman on one of its locomotive engines used and employed by the said defendant, The Chicago, Great Western Railway Company in the management and operation of its said railroad until he was injured as hereinafter set forth.

(7.) That while so employed by the said defendant, The Chicago Great Western Railway Company, in the said capacity and
6 on the 7th day of March, A. D. 1894, said plaintiff was at work on one of the locomotive engines of said defendant, The Chicago, Great Western Railway Company, which said engine was then and there to be sent out from the round-house in the said yards of the said defendant, The Chicago, Great Western Railway Company, to and through said yards and over its said tracks to a place where it was to be attached to a freight train, which said freight train was then and there awaiting the arrival of said locomotive engine at or about Central avenue, at or near the city of Chicago, in the county of Cook, in the State of Illinois, and while said plaintiff

was so engaged on said engine in the performance of his said duty and free from fault or negligence on his part, he was grievously and permanently injured in body, mind and faculties by the carelessness and negligence of said defendant, The Chicago, Great Western Railway Company, and by and through the carelessness and negligence of the said defendants H. F. Whitcomb and Howard Morris, receivers aforesaid, and their agents and servants, in the manner hereinafter stated and set forth.

(8.) That at the time of the injury and damage herein set forth, the said defendants H. F. Whitcomb and Howard Morris, receivers aforesaid, their agents, servants and employés while in the operation of their said railway lines as aforesaid, carelessly, negligently and unlawfully allowed and permitted one of their locomotive
7 engines, used and employed in the operation of their said railway lines, to be and remain standing upon one of the tracks at the place aforesaid, over which the said defendants, H. F. Whitcomb and Howard Morris, receivers aforesaid, their said agents, servants and employees then and there well knew other engines were constantly passing and over which they well knew the engine on which this plaintiff was employed was to pass, but heedless and regardless of the great danger and hazard to which they then and there well knew this plaintiff would be subjected by their carelessness and negligence, they nevertheless carelessly and negligently allowed and permitted said locomotive engine to be and remain standing upon said track without any warning or signal whatever to said plaintiff that said engine was so standing at said place and from which carelessness and negligence on the part of said defendants, H. F. Whitcomb and Howard Morris, receivers aforesaid, their agents, servants and employés, together with the carelessness and negligence of the defendant, The Chicago, Great Western Railway Company, as hereinafter more particularly set forth, the injury and damage to this plaintiff resulted.

(9.) That the said defendant, The Chicago, Great Western Railway Company, the employer of said plaintiff, had on the said 7th day of March aforesaid, required said plaintiff in the line of his duty to pass over the said track, where the said defendants
8 H. F. Whitcomb and Howard Morris, receivers aforesaid, had dangerously and carelessly and negligently permitted its locomotive engine to be and remain at the time of the injury without any warning or notice whatever to the plaintiff showing where the engine of said defendants H. F. Whitcomb and Howard Morris, receivers aforesaid, was liable to be and without having adopted or established any rules for the giving of warning signals of any proper warning to said plaintiff, or without informing him of the danger of passing over said track, of which he was wholly ignorant at said time; and although said defendant, The Chicago, Great Western Railway Company, well knew that said engine would be at said place, required him to run over said place without providing said engine with proper lights which said negligence contributed to the accident occasioned by the carelessness and neg-

ligence of said defendants H. F. Whitcomb and Howard Morris, receivers aforesaid, as herein set forth.

(10.) That while said plaintiff was in his said capacity performing his duties on said engine which was then being moved over said track at said time and place, and while said plaintiff was free from fault or negligence on his part and was moving on and over said track as aforesaid for the purpose of being attached to said freight train at said Central avenue, and while the said defendants H. F. Whitcomb and Howard Morris, receivers aforesaid, had carelessly and negligently allowed and permitted its said engine
9 to be and remain standing upon said track, over which the said engine of the defendant, The Chicago Great Western Railway Company, was to pass the said defendants H. F. Whitcomb and Howard Morris, receivers aforesaid, their agents and servants, well knowing that its said engine was so standing upon said track and liable to obstruct the passage of the said engine of the defendant, The Chicago, Great Western Railway Company and well knowing that there would be danger of a collision with the same, wholly failed to give proper or any signals of its position, so as to be seen or known by the agents or servants in charge of the said engine of the said defendant, The Chicago Great Western Railway Company, by reason whereof the said engine of the said defendant, The Chicago, Great Western Railway Company, without fault of plaintiff collided with and run into the said engine of the said defendants H. F. Whitcomb and Howard Morris, receivers aforesaid, and that the violence of the concussion attendant upon said collision, was so great that this plaintiff was precipitated with great force and violence from the gangway of said engine to the rails and road beneath, that the wheels of said engine upon which said plaintiff had been employed and the wheels of the tender attached thereto ran upon and over said plaintiff, that his right leg was then and there grievously and sorely bruised, crushed, lacerated and mangled so that amputation became necessary and the same was in fact ampu-
10 tated about five inches above — knee, that he was otherwise grievously, seriously and permanently injured and damaged about his body, head and face, that his nose was crushed and bruised and his face permanently disfigured and he was made sick, sore, lame and disabled for work and will never be as well or able-bodied as he was before said injury.

(11.) That said plaintiff was confined to his bed and room for a period of eleven weeks, and suffered intense pain of body and anguish of mind; that his injuries were caused and inflicted by and through the carelessness and negligence of said defendants, their agents, servants and employés in the manner hereinbefore stated and while said plaintiff was free from fault or negligence on his part and while he was in the exercise of all due care and caution, whereby said plaintiff was injured in the manner and form above stated to his damage in the sum of twenty-five thousand dollars ($25,000.00).

Wherefore said plaintiff demands judgment against said defend-

ants in the sum of twenty-five thousand dollars ($25,000.00) and for his costs and disbursements herein.

JOHN A. LOVELY AND
J. F. GEORGE,
Attorneys for Plaintiff, 30 *Gilfillan Block*,
St. Paul, Minnesota.

11 STATE OF MINNESOTA, } ss:
County of Ramsey, }

J. F. George came before me personally, and being first duly sworn doth say that he is one of the attorneys for the plaintiff in the above-entitled action; that the foregoing pleading is true to the best of his knowledge, information and belief, and that the reason why this verification is not made by said plaintiff is that he is absent from the county of Ramsey, Minnesota, where resides this affiant.

J. F. GEORGE.

Subscribed and sworn to before me this 23rd day of September, 1895.

D. E. DWYER,
Notary Public, Ramsey County, Minnesota.

Filed Nov. 1, 1895.

EDWARD G. ROGERS, *Clerk*,
By G. A. LIMBERG, *Deputy*.

12 STATE OF MINNESOTA, }
County of Ramsey. }

District Court, Second Judicial District.

JOHN SMITHSON, Plaintiff,
vs.
THE CHICAGO, GREAT WESTERN RAILWAY COMPANY and H. F. Whitcomb and Howard Morris, Receivers of the Wisconsin Central Company, Defendants.

Answer.

For answer to the complaint of the plaintiff herein, said defendant, The Chicago Great Western Railway Company admits that it is and has been incorporated as alleged in the complaint and that at the time in said complaint alleged it maintained and operated a railroad yard and track within the county of Cook and the State of Illinois under a lease from said Wisconsin Central Railway Company and others.

It admits that on or about the 3rd day of March, 1892, said plaintiff was a servant in the employ of this defendant as in said complaint alleged. Defendant admits that said plaintiff was injured in a collision at the time and place in said complaint alleged, but defendant has no knowledge or information sufficient to form a belief

as to the extent of said injuries or as to whether he was in-
13 jured in the sum of $25,000.00 or any sum whatever. De-
fendant denies that said collision or the injuries of the said plaintiff was caused by any negligence on the part of the defendant and if the said collision and injuries were caused by any negligence on the part of the defendant and if the said collision and injuries were caused by any negligence or want of care it was the negligence and want of care of the said plaintiff and the coemployés and fellow-servants of said plaintiff engaged in the operation of said train and was also caused by the reckless, careless and negligent conduct of the said plaintiff and not otherwise.

Further answering this defendant alleges that the contract of service in the complaint described was made by the said parties thereto, to wit, the said plaintiff and this defendant in the State of Illinois and the services rendered and to be rendered thereunder were and were to be in said State. That the injury sustained by said plaintiff was received in said State and the acts alleged against this defendant was defaults, if any there were, were performed in said State. That the injury complained of by said plaintiff was not caused by any act of negligence or default of this defendant. That by the common law of the State of Illinois and the decisions of the courts of said State, a master was not at the time of said injury or now, liable to a servant for injuries sustained by a servant by reason of any negligence or default of a coservant or coemploye.

That there was not at the time of the injury or at any
14 time any statute or law in Illinois by virtue of which the plaintiff would be entitled to recover from this defendant for injuries caused by the negligence or default of said coservants or employes or either or any of them.

Save as hereinbefore admitted, qualified or otherwise answered unto, the defendant denies each and every allegation, matter and thing in the said complaint contained and each and every part thereof.

Wherefore, defendant prays that the plaintiff's action be dismissed and for its costs and disbursements herein.

DAN LAWLER,
Attorney for Defendant, Chicago, Great Western Railway Co.

STATE OF MINNESOTA, } ss:
County of Ramsey, }

W. B. Bend, being by me first duly sworn on oath says that he is the vice-president and auditor of the Chicago, Great Western Railway Company, a corporation, and one of the defendants in the above-entitled action; that he has read the foregoing answer, knows the contents thereof, and that the same is true of his own knowledge except as to those matters therein stated on information and belief, and as to those matters he believes it to be true.

W. B. BEND.

Subscribed and sworn to before me this 21st day of October, A. D. 1895.

JOHN M. BLAKELY,
[SEAL.] *Notary Public, Ramsey County, Minnesota.*

(Endorsed:) Filed Nov. 1, 1895. Edward G. Rogers, clerk, by H. A. Limberg, deputy.

STATE OF MINNESOTA, }
County of Ramsey. }

District Court, Second Judicial District.

JOHN SMITHSON, Plaintiff,
vs.
THE CHICAGO, GREAT WESTERN RAILWAY COMPANY and H. F. Whitcomb and Howard Morris, Receivers of the Wisconsin Central Company, Defendants.

To the honorable court aforesaid, Henry F. Whitcomb and Howard Morris, as they are receivers in possession of and operating the Wisconsin Central Co.:

The defendants in the above-entitled action respectfully show, that at and prior to the time of the commencement of said action, and thence continually to the present time, they were not,
16 and now are not citizens of this State, or residents therein, but at such times and time were and are citizens of and residents in the State of Wisconsin; and they further show, that they were appointed receivers of the aforesaid company by the circuit court of the United States for the eastern and western districts of Wisconsin and the district of Minnesota respectively, by orders made in a suit in equity brought and now pending in said courts, and dated the 27th and 28th days of Sept., A. D. 1893. That as such receivers they are officers of the said courts above mentioned and subject to their authority. That the above-entitled action is brought against them as such officers by reason of acts alleged to have been done in their official capacity, and that said defendants further show that the above-entitled action has been commenced and is now pending in this court. That the date of said action was October 2nd, A. D. 1895. That the summons and complaint herein was served on F. A. Green, a ticket agent for said receivers, in St. Paul, Minnesota, on the 2nd day of October, A. D. 1895, and that the time for answering or pleading to the complaint herein does not expire until the 22nd day of October, 1895, and that the amounts in controversy in said suit exceeds the sum of two thousand dollars, exclusive of costs, as will more fully appear by reference to the complaint herein. That the above-named defendants, The Chicago, Great Western Railway Co., is, and at the time of the service of the summons herein, was a corporation created, organized, and existing under and
17 by virtue of the laws of the State of Illinois, and was and is a citizen and resident of that State, and was not and is not

now a citizen or resident of the State of Minnesota. That said defendant, The Chicago, Great Western Railway Co., is not a real party in said action, but was by said plaintiff made a party defendant therein for the sole purpose of preventing the removal by your petitioners of said action from said court to the United States court for the district of Minnesota; that said plaintiff was at the time said alleged cause of action arose, an employee of said Great Western Railway Company, and that plaintiff's alleged cause of action against said Chicago, Great Western Railway Co., is based upon the failure of said company to fulfill its contract with said plaintiff in furnishing him the said plaintiff a safe place of employment, and that plaintiff's alleged cause of action against your petitioners is based upon the alleged negligence of their employés in operating a certain engine, thereby injuring said plaintiff who was not in any manner an employee of your petitioners and subject to no contract relations with your petitioners, but a stranger to them. That the injury complained of was not the result of any joint action of said defendants, and that the making of said company a party to said action is a fraud upon the rights of your petitioners and done for the sole purpose of preventing your petitioners from removing said cause to the United States circuit court for the district of Minnesota. That the issues and controversys be-
18 tween said plaintiff and the Chicago, Great Western Railway Company, and the issues and controversy-s between plaintiff and your petitioners are separable and cannot be tried as one issue or controversy, and that by reason of the premises the petitioners are entitled, under the acts of Congress, for such cases made and provided, to remove said suit into the circuit court of the United States for the circuit of Minnesota, 3rd division, and to that end herewith tender to this court proper and sufficient surety for the doing by them of the several things required by the said acts to be done upon the removal of a cause from the State court unto the United States court.

Wherefore, your petitioners pray that said surety may be accepted, and that this court proceed no further in said cause, and that the same be transmitted to the circuit court of the United States for further proceedings therein.

Dated October 22nd, 1895.

H. F. WHITCOMB AND
HOWARD MORRIS,
Receivers of the Wisconsin Central Company,
By McDONALD & BARNARD,
Their Attorneys.

STATE OF MINNESOTA, } ss:
County of Ramsey, }

Personally came before me the undersigned, E. E. Mc-
19 Donald, one of the attorneys for the petitioners in the foregoing petition, and having been by me first duly sworn did depose and say that the several allegations of the foregoing petition are true to the best of his knowledge, information and belief.

E. E. McDONALD.

Subscribed and sworn to before me this 21st day of October, A. D. 1895.

L. D. BARNARD,
[SEAL.] *Notary Public, Ramsey Co., Minn.*

STATE OF MINNESOTA, }
County of Ramsey. }

District Court, Second Judicial District.

JOHN SMITHSON, Plaintiff,
vs.
THE CHICAGO, GREAT WESTERN RAILWAY COMPANY and H. F. Whitcomb and Howard Morris, Receivers of the Wisconsin Central Company, Defendants.

Bond on Removal to United States Court.

Know all men by these presents, that we, Henry F. Whitcomb and Howard Morris, as receivers of the Wisconsin Central
20 Company, as principals, and F. H. Barnard and Charles P. Marvin, as sureties, are firmly bound unto John Smithson, the plaintiff in the above-entitled suit, in the penal sum of five hundred dollars, lawful money of the United States, for the payment of which well and truly to be made, we hereby bind ourselves and our executors and administrators jointly and severally by these presents.

Sealed with our seals and dated on the 22nd day of October, A. D. 1895.

Whereas, the said Henry F. Whitcomb and Howard Morris, receivers, etc., have filed their petition in the court aforesaid, praying for the removal of the above-entitled suits into the circuit court of the United States for the district of Minnesota, 3rd division, under and by virtue of the acts of Congress for such cases made and provided.

Now therefore, if the said Henry F. Whitcomb and Howard Morris, as receivers, etc., shall enter in the circuit court of the United States for the district of Minnesota, 3rd division, wherein and as by law in that behalf made and provided, a copy of the records in said suit, and shall pay all costs that may be awarded by said circuit court, if said court shall hold that such suit was wrongfully or improperly removed thereto, then the above obligation to be void; otherwise to remain in full force and effect.

HENRY F. WHITCOMB AND
HOWARD MORRIS,
21 *Receivers of the Wisconsin Central Railway Co.,*
By McDONALD & BARNARD,
Their Attorneys.
F. H. BARNARD.
CHARLES P. MARVIN.

Signed, sealed and delivered in presence of—
L. D. BARNARD.
ADA K. MILLER.

I hereby approve the within bond and the sureties therein named. Dated Oct. 22nd, 1895.

CHAS. D. KERR,
District Judge.

STATE OF MINNESOTA, } ss:
County of Ramsey, }

Personally came this day before me the undersigned, a notary public in and for said county, F. H. Barnard and Charles P. Marvin, the same persons who signed and sealed the foregoing instrument, and they acknowledged that they executed the same as their free act and deed.

Dated October 22nd, A. D. 1895.

L. D. BARNARD,
[SEAL.] *Notary Public, Ramsey County, Minn.*

STATE OF MINNESOTA, } ss:
County of Ramsey, }

22 Personally came before me, the undersigned, F. H. Barnard and Charles P. Marvin, the same persons who signed and sealed the foregoing instrument, and each having been first duly sworn did depose and say that he is a resident and freeholder of this State and worth the sum of five hundred dollars above his debts and property exempt from levy and sale under execution.

F. H. BARNARD.
CHARLES P. MARVIN.

Subscribed and sworn to before me this 22nd day of October, A. D. 1895.

L. D. BARNARD,
[SEAL.] *Notary Public, Ramsey County, Minn.*

Filed October 22nd, 1895, in the office of clerk of district court, Ramsey county, Minnesota.

EDWARD G. ROGERS, *Clerk.*

STATE OF MINNESOTA, }
County of Ramsey. }

District Court, Second Judicial District.

JOHN SMITHSON, Plaintiff,
vs.
H. F. WHITCOMB and HOWARD MORRIS, Receivers of the Wis. Cen. Co., and The Chicago Great Western Railway Company, Defendants.

23 GENTLEMEN: Please take notice that upon the summons, complaint and pleadings heretofore filed in the above-entitled action, and in particular upon the petition and bond for removal filed by the defendant, a copy of which is hereto annexed and herewith served upon you, the defendants by their counsel will, at the court-house in the city of St. Paul, in said county, on the

second day of November, current, at the opening of court on said day or as soon thereafter as counsel can be heard, move that an order issue for the removal of said action to the circuit court of the United States for the district of Minnesota.

Dated St. Paul, Minnesota, October 22nd, A. D. 1895.

HOWARD MORRIS AND
THOS. H. GILL,
McDONALD & BARNARD,
Defendants' Attorneys, 616 N. Y. Life B'ld'g, St. Paul, Minn.

To Messrs. John A. Lovely and J. F. George, plaintiff's attorneys.

24 STATE OF MINNESOTA, }
County of Ramsey. }

District Court, Second Judicial District.

JOHN SMITHSON, Plaintiff,
vs.
THE CHICAGO, GREAT WESTERN RAILWAY COMPANY and H. F. Whitcomb and Howard Morris, Receivers of the Wisconsin Central Company, Defendants.

Upon the pleadings in the above-entitled cause, and upon the petition of the defendants H. F. Whitcomb and Howard Morris, receivers of the Wisconsin Central Company, heretofore read and filed, and upon the bond aforesaid approved by this court, and upon the motion of the defendants, H. F. Whitcomb and Howard Morris, receivers of the Wisconsin Central Company, by their attorneys Messrs. McDonald & Barnard, it is

Ordered, that the above-entitled action be, and the same is hereby ordered removed to the circuit court of the United States, State of Minnesota, 3rd division, and the clerk of this court is ordered to transmit the record as provided by law in such cases.

Dated November 2nd, 1895.

CHAS. D. KERR,
District Judge.

25 Filed November 2nd, 1895, in the office of the clerk of district court, Ramsey county, Minnesota.

EDWARD G. ROGERS, *Clerk.*

STATE OF MINNESOTA, }
County of Ramsey. }

District Court, Second Judicial District.

JOHN SMITHSON, Plaintiff,
vs.
H. F. WHITCOMB and HOWARD MORRIS, Receivers of the Wisconsin Central Company, and The Chicago, Great Western Railway Company, Defendants.

Now comes the plaintiff, John Smithson, and answering the petition of H. F. Whitcomb and Howard Morris, receivers of The Wis-

consin Central Company, one of the defendants herein, for removal of this cause to the circuit court of the United States for the district of Minnesota—

Respectfully shows to the court:

That the defendant, The Chicago, Great Western Railway Company is a real party in interest in this action, and was by this plaintiff made a party defendant in good faith and was not
26 made a party defendant herein for the purpose of preventing the removal of this action from said State court to said United States court.

That the injury complained of was the result of the carelessness and negligence of both defendants named in this complaint, and the making of both of said defendants, H. F. Whitcomb and Howard Morris, receivers of the Wisconsin Central Company, and the Chicago, Great Western Railway Company parties defendant in this action is not a fraud upon the said receivers or upon any rights of said receivers, or any other defendant in this action. That the issues and controversies between said plaintiff and the said Chicago, Great Western Railway Company and the issues and controversies between the plaintiff and said receivers are not separable and they can and should be tried together as one issue and one controversy, and the plaintiff is entitled to have said issue tried together at one and the same time against both and all said defendants.

2.

Plaintiff further alleges and shows to the court:

That on the 2nd day of October, 1895, the complaint and summons herein *was* duly served upon all of the defendants named herein.

That on the 19th day of October, 1895, a petition for removal of this cause to said circuit court of the United States dated the 16th day of October, 1895, with a copy of the bond of the said receivers annexed and a notice thereto attached signed by said receiv-
27 ers specifying the 2nd day of November as the time for hearing said pemtition before said district court in the State of Minnesota, county of Ramsey, was served on the attorneys for the plaintiff herein, a copy of which petition and bond and the original notice is on file herein, and which said petition, notice and bond are here referred to and made a part hereof.

That on the 21st day of October, 1895, the Chicago, Great Western Railway Company, one of the defendants herein, served its duly verified answer to the complaint herein, a copy of which answer is on file herein, and is here referred to and made a part hereof.

That said Chicago, Great Western Railway Company, defendant herein, has filed no petition for the removal of this cause and has served no notice of application for such removal and the time for filing such petition and instituting any proceedings for such removal has expired and no such proceedings have been instituted by said Chicago, Great Western Railway Company, one of the defendants herein. That afterwards and on the 22nd day of October, 1895, said receivers served another petition on the attor-

neys for the plaintiff herein for the removal of said cause to the circuit court of the United States, dated October 22nd, 1895, which said petition is accompanied by a bond and notice all dated the same day, giving notice of application to the said district court of Ramsey county, State of Minnesota, on the 2nd day of November, 1895.

28 The plaintiff admits all the allegations contained in said petition from the beginning thereof down to and including the allegation, "that the amount in controversy in the said suit exceeds the sum of two thousand dollars ($2,000), exclusive of costs, as will more fully appear by reference to the complaint herein," on the second page of said petition.

Save and except as herein expressly admitted, qualified or otherwise denied, the plaintiff denies each and every allegation, matter and thing in said petition contained and each and every part and portion thereof.

Wherefore, the plaintiff prays that said cause be not removed; and for such further relief as may be just and proper, and for costs.

By JOHN A. LOVELY,
J. F. GEORGE,
Attorneys for Plaintiff, 30 *Gilfillan Block, St. Paul, Minn.*

(Endorsed:) Filed Nov. 1, 1895. Edward G. Rogers, clerk, by G. A. Limberg, deputy.

29 United States Circuit Court, District of Minnesota, Third Division.

JOHN SMITHSON, Plaintiff,
vs.
H. F. WHITCOMB and HOWARD MORRIS, Receivers of the Wisconsin Central Company, and The Chicago, Great Western Railway Company, Defendants.

On the affidavit of J. F. George filed herein, and on all the papers, pleadings and files in this case,

It is ordered, that the defendants H. F. Whitcomb and Howard Morris, receivers of the Wisconsin Central Company, show cause, if any they may have, before the Honorable R. R. Nelson, judge of this court, at his chambers in St. Paul, Minnesota, on Monday the 25th day of Nov., 1895, at 2 o'clock p. m., why this cause should not be remanded to the district court of Ramsey county, State of Minnesota, for trial.

Let a copy of this order be served on Messrs. McDonald & Barnard, attorneys for said receivers, before the 19th day of November, 1895.

R. R. NELSON, *Judge.*

30 United States Circuit Court, District of Minnesota, Third Division.

JOHN SMITHSON, Plaintiff,
vs.
H. F. WHITCOMB and HOWARD MORRIS, Receivers of the Wisconsin Central Company, and The Chicago Great Western Railway Company, Defendants.

STATE OF MINNESOTA, *County of Ramsey,* } *ss:*

J. F. George being duly sworn says that he is one of the attorneys for the plaintiff in the above-entitled action.

That said action was commenced by the plaintiff against the defendants above named in the district court of Ramsey county in the State of Minnesota, and due service of process had upon both of the defendants named therein on the 2nd day of October, 1895.

That on the 21st day of October, 1895, the defendant, The Chicago, Great Western Railway Company, served its answer to the complaint herein on the attorneys for the plaintiff; but did not and has not at any time filed any petition or made any motion
31 to remove this cause from the said State court to the circuit court of the United States.

That on the 2nd day of November, 1895, an order was made by said district court of the county of Ramsey, State of Minnesota, based on the petition of the defendants, H. F. Whitcomb and Howard Morris, receivers of the Wisconsin Central Company, for removal of this case to the circuit court of the United States of the district of Minnesota, as will appear by the files and records in this case in said circuit court.

That this plaintiff is entitled to have said cause tried against both of the defendants at the same time in the said district court of Ramsey county, State of Minnesota, at the next term of said court to be held in December, 1895, as appears by the pleadings and papers on file in this cause.

Affiant makes this affidavit for the purpose of obtaining an order from this court requiring said defendants, H. F. Whitcomb and Howard Morris, receivers of the Wisconsin Central Company, to show cause, if any they may have, at a time to be fixed by this court, why said cause should not be remanded to said State court for trial.

J. F. GEORGE.

Subscribed and sworn to before me this 16th day of November, 1895.

L. B. TROTT,
Deputy Clerk, U. S. Circuit Court, District of Minnesota.

32 United States Circuit Court, District of Minnesota, Third Division.

JOHN SMITHSON, Plaintiff,
vs.
THE CHICAGO, GREAT WESTERN RAILWAY COMPANY and H. F. Whitcomb and Howard Morris, Receivers of the Wisconsin Central Company, Defendants.

It is agreed for the mutual convenience of both parties upon the motion to remand said case that the hearing of the same shall be fixed at a future date, to wit, the 3rd day of January, 1896, at ten o'clock a. m., to be heard on that day, unless the removing party shall upon two days' notice bring it on sooner with permission of the court.

JOHN A. LOVELY AND
J. F. GEORGE,
Attorneys for Plaintiff.
T. H. GILL AND
McDONALD & BARNARD,
Attorneys for Defendants.

33 United States Circuit Court, Minnesota District, 3rd Division.

SMITHSON
vs.
C., G. W. R'Y CO. ET AL., Defendants.

Order Remanding Case.

NELSON, *Judge:*

Motion to remand granted on authority of Thompson *vs.* C., St. P. & K. C. R'y Co., and C., M. & St. P. R'y Co. (60 Federal Report, 773).

So ordered.
Feb'y 6th, 1896.

Filed Feb'y 7th, 1896.
No. 1172 E. law.

STATE OF MINNESOTA,
District of Minnesota.

United States Circuit Court, Third Division.

Friday morning court opened pursuant to adjournment.

Present: Hon. R. R. Nelson, judge; Hon. E. C. Stringer, U. S. dist. attorney; Hon. R. T. O'Connor, U. S. marshal; Oscar B. Hillis, clerk.

34 JOHN SMITHSON, Plaintiff,
vs.
THE GREAT WESTERN R'Y CO. and H. F. Whitcomb and Howard Morris, Receivers of the Wisconsin Central Railway Company, Defendants. } E. Law. No. 1127.

The motion to remand this cause to the court from whence it was removed having heretofore been fully argued by the attorneys for the respective parties, duly submitted, and by the court taken under advisement.

Now, after due consideration thereof, it is by the court ordered that the said cause be and the same hereby is remanded to the district court of Ramsey county, State of Minnesota.

Filed February 14th, 1896, in the office of the clerk of the district court of Ramsey county, Minnesota.

EDWARD G. ROGERS, *Clerk.*

STATE OF MINNESOTA, *District of Minnesota.*

United States Circuit Court, Third Division.

I, Oscar B. Hillis, clerk of the circuit court of the United
35 States for the district of Minnesota, do hereby certify that I have carefully compared the foregoing paper-writing with the original thereof, which is in my custody, as such clerk, and that such copy is a correct copy of such original and of the whole thereof in the cause therein named.

Witness my hand as clerk and the seal of said court done at my office at St. Paul, Minnesota, this 14th day of February, A. D. 1896.

OSCAR B. HILLIS,
By LOUISE B. TROTT, *Deputy.*

[United States Court Seal.]

STATE OF MINNESOTA, *County of Ramsey.*

District Court.

JOHN SMITHSON, Plaintiff,
vs.
THE CHICAGO GREAT WESTERN RAILWAY COMPANY and H. F. Whitcomb and Howard Morris, Receivers of the Wisconsin Central Company, Defendants.

Whereas, the defendants, H. F. Whitcomb and Howard Morris, receivers above named, have not answered herein, and are in default of an answer.

Now, in consideration that plaintiff allow said defendants,
36 H. F. Whitcomb and Howard Morris, receivers, to serve an answer herein said defendants, H. F. Whitcomb and Howard

Morris, receivers, hereby stipulate and agree that the plaintiff shall have a trial of this cause in said court at the June term thereof, 1896, so far as defendants H. F. Whitcomb and Howard Morris are concerned, and in case of a final judgment in said action in favor of said plaintiff against said receivers that the receivers will not oppose the allowance of the same before the master in chancery.

June 4th, 1896.

J. A. LOVELY,
J. F. GEORGE, *Attorneys for Plaintiff.*
THOS. H. GILL AND
McDONALD & BARNARD,
Attorneys for Defendants H. F. Whitcomb and H. Morris, Receivers.

Filed April 20th, 1897.

STATE OF MINNESOTA, } ss:
County of Ramsey, }

District Court, Second Judicial District.

JOHN SMITHSON, Plaintiff,
vs.
CHICAGO, GREAT WESTERN RAILWAY, H. F. WHITCOMB and Howard Morris, Receivers Wisconsin Central Railway, Defendants.

37 Now comes above-named defendants, H. F. Whitcomb and Howard Morris, as receivers, and for their separate answer respectfully show to this court and allege:

First. They admit the incorporation of the Wisconsin Central railway as alleged in plaintiff's complaint and admit the appointment of these defendants as receivers as therein alleged.

Second. Further answering said complaint defendants deny each and every allegation, matter and statement in said complaint contained not hereinbefore admitted.

Third. Defendants deny that said plaintiff was injured through the carelessness or negligence of these defendants and allege that if he was injured at all it was through his own carelessness and negligence and the carelessness and negligence of his fellow-servants employed with him, and denies that by any reason of any carelessness or negligence on the part of these defendants said plaintiff has been damaged in the sum of twenty-five thousand ($25,000.00) dollars or any other sum.

Wherefore, defendants demand that said plaintiff take nothing by his pretended cause of action so far as they are concerned and that they have judgment for their costs and disbursements herein.

THOS. H. GILL AND
McDONALD & BARNARD,
Attorneys-at-law.

38 STATE OF MINNESOTA, } ss:
County of Ramsey, }

W. H. McDonald being by me first duly sworn deposes and says that he is one of the attorneys for the above-named defendants and that he has read the foregoing answer and knows the contents thereof; that the same is true of his own knowledge except as to those matters therein stated on information and belief and as to those matters he believes them to be true.

That the reason why this verification is not made by defendants or one of them is that they and each of them are not residents of the county of Ramsey, State of Minnesota, wherein resides this deponent.

W. H. McDONALD.

Subscribed and sworn to before me this 5th day of March, A. D. 1896.

[NOTARIAL SEAL.] CHAS. P. MARVIN,
Notary Public, Ramsey County, Minnesota.

Filed June 19th, 1896, in the office of the clerk of district court, Ramsey county.

EDWARD G. ROGERS, *Clerk.*

39 STATE OF MINNESOTA, }
County of Ramsey. }

District Court.

JOHN SMITHSON, Plaintiff,
vs.
THE CHICAGO GREAT WESTERN RAILWAY COMPANY and H. F. Whitcomb and Howard Morris, Receivers of the Wisconsin Central Company, Defendants.

The plaintiff herein replying to the answer of the defendants H. F. Whitcomb and Howard Morris, receivers of the Wisconsin Central Company, alleges:

That he denies each and every allegation, matter and thing in said answer contained, and each and every part thereof, except such allegations therein as are alleged in the complaint herein.

Wherefore, plaintiff demands judgment as in the complaint prayed.

JOHN A. LOVELY,
J. F. GEORGE,
Attorneys for Plaintiff, 30 *Gilfillan Block, St. Paul, Minn.*

Filed April 23rd, 1897.

40 STATE OF MINNESOTA, } ss:
County of Ramsey, }

J. F. George came before me and being duly sworn doth say, that he is attorney for the plaintiff in the above-entitled action; that the

foregoing pleading is true, to the best of his knowledge, information and belief; and that the reason why this affidavit of verification is not made by said plaintiff is that, he is absent from the county of Ramsey, Minnesota, where resides affiant, his said attorney.

J. F. GEORGE.

Subscribed and sworn to before me this 4th day of June, 1896.

THOS. M. DILL,
Notary Public, Minnesota.

STATE OF MINNESOTA, }
County of Ramsey. }

District Court, Second Judicial District.

JOHN SMITHSON, Plaintiff,
vs.
H. F. WHITCOMB and HOWARD MORRIS, Receivers of the Wisconsin Central Company, and The Chicago, Great Western Railway Company, Defendants.

SIRS: You will please to take notice, that the issue of law
41 and fact in the above-entitled action, will be brought on for trial at the next general term of the district court aforesaid, appointed to be held in and for the county of Ramsey at the court-house in the city of St. Paul in said county, on Monday the 1st day of June, 1896, at the opening of said court on that day, or as soon thereafter as counsel can be heard.

Yours respectfully, JOHN A. LOVELY,
J. F. GEORGE,
Attorneys for Plaintiff, 30 Gilfillan Block, St. Paul, Minn.

To Messrs. McDonald & Barnard and H. Morris and Thos. H. Gill, attorneys for receivers, and Dan W. Lawler, attorney for C., G. W. R'y Co.

STATE OF MINNESOTA, }
Ramsey County. }

District Court.

JOHN SMITHSON, Plaintiff,
vs.
H. F. WHITCOMB and HOWARD MORRIS, Receivers of the Wisconsin Central Company, and The Chicago, Great Western Railway Company, Defendants.

42 It is stipulated by and between the parties to the above-entitled action and their attorneys that this cause shall be continued until the April term of this court.

Jan'y 4th, 1897.

J. A. LOVELY AND
J. F. GEORGE,
Attorneys for Plaintiff.
McDONALD & BARNARD,
Attorneys for Receivers.
—— ——,
Attorney for C., G. W. R'y Co.

STATE OF MINNESOTA, } ss:
County of Ramsey, }

District Court, Second Judicial District.

JOHN SMITHSON, Plaintiff,
vs.
CHICAGO, GREAT WESTERN RAILWAY, H. F. WHITCOMB and Howard Morris, Receivers Wisconsin Central Railway, Defendants.

Now come the above-named defendants, H. F. Whitcomb and Howard Morris, as receivers, etc., and for their separate amended answer respectfully show to this court and allege:

First. They admit the incorporation of the Wisconsin
43 Central railway as alleged in plaintiff's complaint and admit the appointment of these defendants as receivers as therein alleged.

Second. Further answering said complaint defendants deny each and every allegation, matter and statement in said complaint contained not hereinbefore admitted.

Third. Defendants deny that said plaintiff was injured through the carelessness or negligence of these defendants and allege that if he was injured at all it was through his own carelessness and negligence and the carelessness and negligence of his fellow-servants employed with him, and deny that by any reason of any carelessness or negligence on the part of these defendants said plaintiff has been damaged in the sum of twenty-five thousand dollars ($25,000) or any other sum.

Fourth. And for further answer these defendants allege and show to this court that this court is wholly without jurisdiction to hear, try and determine the matters at issue in this action, for the reason that the matter has heretofore been properly removed to, and is now only properly and lawfully pending in, the circuit court of the United States for the district of Minnesota, third division.

Wherefore defendants demand that said plaintiff take nothing by his pretended cause of action so far as they are concerned and that they have judgment for their costs and disbursements herein.

McDONALD & BARNARD,
Attorneys for Defendants.

44 STATE OF MINNESOTA, } ss:
County of Ramsey, }

W. H. McDonald being by me first duly sworn deposes and says that he is one of the attorneys for the above-named defendants and that he has read the foregoing answer and knows the contents thereof, that the same is true of his own knowledge except as to those matters therein stated on information and belief and as to those matters he believes them to be true.

That the reason why this verification is not made by defendants or one of them is that they and each of them are not residents of

the county of Ramsey, State of Minnesota, wherein resides this deponent.

W. H. McDONALD.

Subscribed and sworn to before me this 7th day of April, A. D. 1897.

J. F. GEORGE,
[NOTARIAL SEAL.] *Notary Public, Ramsey County, Minnesota.*

Filed April 21st, 1897, in the office of the clerk of district court for Ramsey Co., Minn.

EDWARD G. ROGERS, *Clerk.*

45 STATE OF MINNESOTA, }
County of Ramsey. }

District Court, Second Judicial District.

JOHN SMITHSON, Plaintiff,
vs.
THE CHICAGO GREAT WESTERN RAILWAY Co. and H. F. WHITcomb and Howard Morris, Receivers of the Wisconsin Central Company, Defendants.

Petition for Removal to the United States Court.

To the honorable the court aforesaid:

The petition of the above-named defendants respectfully shows, that heretofore, to wit, on or about the 22nd day of October, 1895, the above-named receivers appearing for the purpose of removal in the above-entitled action made and filed therein their said petition as aforesaid, to wit:

46 STATE OF MINNESOTA, }
County of Ramsey. }

District Court, Second Judicial District.

JOHN SMITHSON, Plaintiff,
vs.
CHICAGO, GREAT WESTERN RAILWAY Co., and H. F. WHITCOMB and Howard Morris, Receivers of the Wisconsin Central Company, Defendants.

To the honorable court aforesaid:

Henry F. Whitcomb and Howard Morris, as they are receivers in possession of and operating the Wisconsin Central Co.

The defendants in the above-entitled action respectfully show, that at and prior to the time of the commencement of said action, and thence continually to the present time, they were not, and now are not citizens of this State, or residents therein, but at such times and time were and are citizens of and residents in the State of Wisconsin; and they further show, that they were appointed re-

ceivers of the aforesaid company by the circuit court of the United States for the eastern and western districts of Wisconsin and the district of Minnesota respectively, by orders made in a suit in equity brought and now pending in said court, and dated the 27th and 28th days of Sept., A. D. 1893. That as such receivers they are
47 officers of the said courts above mentioned and submitted to their authority. That the above-entitled action is brought against them as such officers by reason of acts alleged to have been done in their official capacity, and that said defendants further show that the above-entitled action has been commenced and is now pending in this court. That the date of said action was October 2nd, A. D. 1895. That the summons and complaint herein was served on F. A. Green, a ticket agent for said receivers, in St. Paul, Minnesota, on the 2nd day of October, A. D. 1895, and that the time for answering or pleading to the complaint herein does not expire until the 22nd day of October, 1895, and that the amounts in controversy in said suit exceeds the sum of two thousand dollars, exclusive of costs, as will more fully appear by reference to the complaint herein. That the above-named defendants, The Chicago, Great Western Railway Co., is, and at the time of the service of the summons herein, was a corporation created, organized and existing under and by virtue of the laws of the State of Illinois, and was and is a citizen and resident of that State, and was not and is not now a citizen or resident of the State of Minnesota. That said defendant, The Chicago, Great Western Railway Co., is not a real party in said action, but was by said plaintiff made a party defendant therein for the sole purpose of preventing the removal by your petitioners of said action from said court to the United States court for the district of Minnesota; that said plaintiff was at the time said
48 alleged cause of action arose, an employé of said Great Western Railway Company, and that plaintiff's alleged cause of action against said Chicago, Great Western Railway Co. is based upon the failure of said company to fulfill its contract with said plaintiff in furnishing him, the said plaintiff, a safe place of employment, and that plaintiff's alleged cause of action against your petitioners is based upon the alleged negligence of their employés in operating a certain engine, thereby injuring said plaintiff who was not in any manner an employé of your petitioners and subject to no contract relations with your petitioners, but a stranger to them. That the injury complained of was not the result of any joint action of said defendants, and that the making of said company a party to said action is a fraud upon the rights of your petitioners and done for the sole purpose of preventing your petitioners from removing said cause to the United States circuit court for the district of Minnesota. That the issues and controversies between said plaintiff and the Chicago, Great Western Railway Company, and the issues and controversies between plaintiff and your petitioners are separable and cannot be tried as one issue or controversy, and that by reason of the premises the petitioners are entitled, under the acts of Congress for such cases made and provided, to remove said suit into the circuit court of the United States for the

circuit of Minnesota, 3rd division, and to that end herewith tender to this court proper and sufficient surety for the doing by
49 them of the several things required by the said acts to be done upon the removal of a cause from the State court unto the United States court.

Wherefore your petitioners pray that said surety may be accepted and that this court proceed no further in said cause, and that the same be transmitted to the circuit court of the United States for further proceedings therein.

Dated October 22nd, 1895.

H. F. WHITCOMB AND
HOWARD MORRIS,
Receivers of the Wisconsin Central Company,
By McDONALD & BARNARD,
Their Attorneys.

STATE OF MINNESOTA, } ss:
County of Ramsey, }

Personally came before me, the undersigned, E. E. McDonald, one of the attorneys for the petitioners in the foregoing petition, and, having been by me first duly sworn, did depose and say, that the several allegations of the foregoing petition are true to the best of his knowledge, information and belief.

E. E. McDONALD.

Subscribed and sworn to before me this 21st day of October, A. D. 1895.

L. D. BARNARD,
[SEAL.] *Notary Public, Ramsey Co., Minn.*

50 That your petitioners at the same time filed the bond on removal, which was duly approved on the day last aforesaid by the Hon. Chas. D. Kerr, district judge. That thereupon an order was duly entered in said cause removing said action in the circuit court of the United States for the district of Minnesota, 3rd division, and such proceedings were in said court thereafter had upon the motion to remand the cause from said Federal court to this court that an order was therein entered remanding the said cause in words and figures as follows, to wit:

Order of Remand.

United States Circuit Court, Minnesota District, 3rd Division.

SMITHSON
vs.
GREAT WESTERN RAILWAY CO. ET AL., Defendants.

NELSON, *Judge:*

Motion to remand granted on authority of Thompson *vs.* C., St. P. & K. C. R'y Co., and C., M. & St. P. R'y Co., 60 Fed. Rep., 773, so ordered.

Feb. 6th, 1896.

Filed Feb. 7th, 1896.

That in said action said defendants receivers, and said defendant Chicago, Great Western Company appeared and answered, and such proceedings were had, and the same came on for trial and was tried before the Hon. J. W. Willis, and the jury on the 20th and 21st days of April, 1897, all parties appearing by counsel, and after the close of all testimony in said cause, and on motion of the defendant, The Great Western Railway Company, the said trial judge directed that the jury return in favor of said defendant, The
51 Chicago, Great Western Railway Co., a verdict in said action.

Your petitioners pray leave to refer to the said original petition for removal on file in this case, a copy of which is here before set out, and allege that all the statements, facts and circumstances therein set forth are true as therein alleged.

Wherefore, your petitioners pray that this court proceed no further in said cause, but that the same be removed and the records therein transmitted to the said circuit court of the United States for the district of Minnesota for further proceedings therein.

Dated April 21st, 1897.

H. F. WHITCOMB AND
HOWARD MORRIS,
Receivers Wisconsin Central Company.
McDONALD & BARNARD,
Their Attorneys.

STATE OF MINNESOTA, } ss:
County of Ramsey, }

Personally came before me the undersigned W. H. McDonald, attorney for the petitioners in the foregoing petition, and having been by me first duly sworn did depose and say that the several allegations of the foregoing petition are true to the best of his knowledge and information and belief; that the reason why this verification is not made by the said receivers or one of them is, that
52 neither of them are residents of Ramsey county wherein their said attorney resides, and are absent therefrom.

W. H. McDONALD.

Subscribed and sworn to before me this 21st day of April, 1897.

L. D. BARNARD,
[SEAL.] *Notary Public, Minnesota.*

Filed April 22nd, 1897, in the office of the clerk of district court, Ramsey county, Minn.

EDWARD G. ROGERS, *Clerk.*

STATE OF MINNESOTA, }
County of Ramsey. }

District Court, Second Judicial District.

JOHN SMITHSON, Plaintiff,
vs.
H. F. WHITCOMB and HOWARD MORRIS, Receivers of the Wis. Cen. Co., and The Chicago, Great Western Railway Company, Defendants.

Bond on Removal to United States Court.

Know all men by these presents, that we, Henry F. Whitcomb and Howard Morris, as receivers of the Wisconsin Central Company, as principals, and F. H. Barnard and Chas. P. Marvin, sureties,
53 are held and firmly bound unto John Smithson, the plaintiff in the above-entitled suit, in the penal sum of five hundred dollars, lawful money of the United States, for the payment of which, well and truly to be made, we hereby bind ourselves and our executors and administrators, jointly and severally firmly by these presents.

Sealed with our seals and dated on the 22nd day of October, A. D. 1895.

Whereas, the said Henry F. Whitcomb and Howard Morris, receivers, etc., have filed their petition in the court aforesaid, praying for the removal of the above-entitled suit into the circuit court of the United States for the district of Minnesota, third division, under and by virtue of the acts of Congress for such cases made and provided.

Now therefore, if the said Henry F. Whitcomb and Howard Morris, as receivers, etc., shall enter in the circuit court of the United States for the district of Minnesota, third division, when and as by law in that behalf made and provided, a copy of the record in the said suit, and shall pay all costs that may be awarded by the said circuit court, if said court shall hold that such suit was
54 wrongfully or improperly removed thereto, then the above-written obligation to be void, but otherwise to remain in full force and effect.

H. F. WHITCOMB AND
HOWARD MORRIS,
Receivers Wisconsin Central Company,
By McDONALD & BARNARD,
Their Attorneys.
F. H. BARNARD. [SEAL.]
CHAS. P. MARVIN. [SEAL.]

Signed, sealed and delivered in presence of—
L. D. BARNARD.
ADA MILLER.

STATE OF MINNESOTA, } ss:
County of Ramsey, }

Personally came this day before me the undersigned, a notary public in and for the said county, F. H. Barnard and Chas. P. Marvin, the same persons who signed and sealed the foregoing instrument, and they acknowledged that they executed the same as their free act and deed.

Dated October 22, A. D. 1895.

L. D. BARNARD,

[SEAL.] *Notary Public, Ramsey County, Minnesota.*

55 STATE OF MINNESOTA, } ss:
County of Ramsey, }

Personally came before the undersigned, F. H. Barnard and Chas. P. Marvin, the same persons who signed and sealed the foregoing instrument, and each having been first duly sworn did depose and say that he is a resident and freeholder of this State and worth the sum of five hundred dollars above debts, liabilities and property exempt from levy and sale under execution.

F. H. BARNARD.
CHAS. P. MARVIN.

Subscribed and sworn to before me this 22nd day of October, A. D. 1895.

L. D. BARNARD,

[SEAL.] *Notary Public, Ramsey County, Minnesota.*

STATE OF MINNESOTA, }
County of Ramsey. }

District Court, 2nd Judicial District.

JOHN SMITHSON, Plaintiff,
vs.
THE GREAT WESTERN RAILWAY Co. and H. F. WHITCOMB and Howard Morris, Receivers of the Wisconsin Central Railway Co., Defendants.

Verdict.

56 We, the jury in the above-entitled action find a verdict in favor of the defendant, the Great Western Railway Company.

St. Paul, April 22nd, 1897.

WILBUR H. HOWARD, *Foreman.*

STATE OF MINNESOTA, }
County of Ramsey. }

District Court, Second Judicial District.

JOHN SMITHSON, Plaintiff,
vs.
THE CHICAGO GREAT WESTERN RAILWAY COMPANY and H. F. Whitcomb and Howard Morris, Receivers of the Wisconsin Central Company, Defendants.

Verdict.

We, the jury in the above-entitled action, find a verdict in favor of the plaintiff and against H. F. Whitcomb and Howard Morris, receivers of the Wisconsin Central Railway Company, and assess his damages at the sum of $12,500.00.

St. Paul, April 22nd, 1897.

WILBUR H. HOWARD, *Foreman.*

Filed April 23rd, 1897.

57 STATE OF MINNESOTA, }
County of Ramsey. }

District Court, 2nd Judicial District.

JOHN SMITHSON, Plaintiff,
vs.
THE CHICAGO GREAT WESTERN RAILWAY COMPANY and H. F. Whitcomb and Howard Morris, Receivers of the Wisconsin Central Company, Defendants.

The cause above entitled having duly come on to be heard at a special term of this court upon a motion made therein by the defendants, the receivers of the Wisconsin Central Company, to set aside said verdict heretofore rendered in said case, and to grant a new trial thereof upon certain grounds, and said motion being duly argued, submitted and considered by the court, now upon due consideration it is ordered that said motion be and the same is hereby denied.

St. Paul, Minn., June 28th, 1897.

JOHN W. WILLIS,
Judge Dist. Court.

Filed June 28th, 1897.

58 STATE OF MINNESOTA, }
County of Ramsey. }

District Court.

JOHN SMITHSON, Plaintiff,
vs.
H. F. WHITCOMB and HOWARD MORRIS, Receivers of the Wisconsin Central Railway Company, and Chicago, Great Western Railway Company, Defendants.

To McDonald & Barnard and Thos. H. Gill, receivers' att'ys:

Please take notice, that his honor, Judge John W. Willis, has on the 28th day of June, 1897, filed with the clerk of the above-named court his decision of the motion of the said receivers for a new trial in this action, and that said decision is now on file and that he has denied the motion so made by said receivers.

JOHN A. LOVELY AND
J. F. GEORGE,
Attorneys for Plaintiff, 716 N. Y. Life Bldg., St. Paul, Minn.

Endorsed: Due service of the within notice received this 29th day of June, 1897. McDonald & Barnard and T. H. Gill, attorneys for receivers.

59 STATE OF MINNESOTA, }
County of Ramsey. }

District Court.

JOHN SMITHSON, Plaintiff,
vs.
H. F. WHITCOMB and HOWARD MORRIS, Receivers of the Wisconsin Central Company, and The Chicago, Great Western Railway Company, Defendants.

Amount of verdict against above-named defendants, H. F. Whitcomb and Howard Morris, receivers of the Wisconsin Central Company.

Amount of verdict.....	$12,500.00
Interest on same from the 23rd day of April, 1897.....	238.20
	$12,738.20

Plaintiff's costs and disbursements against the defendants, H. F. Whitcomb and H. Morris, receivers of the Wisconsin Central Company.

Statutory costs	$10.00
Three subpœnas	.75
Jury fees	3.00
Clerk's fees (to be taxed)	4.25

Witness fees, viz:

Names.	Residence.	Days.	Miles.	
Martin Larsen	Chicago, Illinois	Three	200	15.00
Richard Long	" "	"	"	15.00
George Packer	" "	"	"	15.00
Mathew H. Long	" "	"	"	15.00
Wm. Deveraux	" "	"	"	15.00
Fred L. Frazier	" "	"	"	15.00

The above bill of costs and disbursements taxed and allowed against the defendants, H. F. Whitcomb and Howard Morris, receivers of Wisconsin Central Company 108.00

Total amount $12,846.20

Dated —— —, 1897.

EDWARD G. ROGERS, *Clerk*,
By G. A. LIMBERG, *Deputy Clerk*.

STATE OF MINNESOTA, } ss:
County of Ramsey, }

J. F. George being first duly sworn says on oath that he is one of the attorneys of the plaintiff in the above-entitled action; that the foregoing is a true and correct statement of the costs and disbursements of said plaintiff in the above-entitled action, and that the foregoing items of disbursements and each item thereof, have been actually and necessarily paid or incurred therein, by and on behalf of said plaintiff; and that each of the above-named witnesses was a material witness for the said plaintiff in said action, and was
61 duly sworn, and testified on the trial of said action, on behalf of said plaintiff. That each of said witnesses actually and necessarily traveled two hundred (200) miles from the boundary line of this State, which each of said witnesses passed in coming from his said residence to the city of St. Paul, where said trial was had, and returning to his said residence, and for the purpose of testifying each of said witnesses actually and necessarily attended said court three (3) days, to wit: April 20th, 21st and 22nd, 1897, and that the residence of each of said witnesses is Chicago, Illinois.

J. F. GEORGE.

Subscribed and sworn to before me this 29th day of July, 1897.

JOHN H. IVES,
[NOTARIAL SEAL.] *Notary Public, Ramsey County, Minnesota.*

STATE OF MINNESOTA, }
County of Ramsey. }

District Court.

JOHN SMITHSON, Plaintiff,
vs.
H. F. WHITCOMB and HOWARD MORRIS, Receivers of the Wisconsin Central Company, and The Chicago, Great Western Railway Company, Defendants.

SIRS: Please take notice that on 31st day of July, 1897, at ten o'clock a. m., application will be made to E. G. Rogers, clerk
62 of said court, at his office in the court-house in the city of St. Paul, in the county of Ramsey and State of Minnesota, to have the within bill of costs and disbursements taxed and inserted in the judgment then and there to be entered herein against H. F. Whitcomb and H. Morris, receivers of the Wisconsin Central Company.

JOHN A. LOVELY AND
J. F. GEORGE,
Attorneys for Plaintiff, 716 N. Y. Life Bldg., St. Paul, Minnesota.

To Messrs. McDonald & Barnard and Thos. H. Gill, attorneys for receivers of Wisconsin Central Company.

STATE OF MINNESOTA, }
District of Minnesota. }

United States Circuit Court, Third Division.

JOHN SMITHSON, Plaintiff,
vs.
THE GREAT WESTERN R'Y CO. and H. F. WHITCOMB and Howard Morris, Receivers of the Wisconsin Central Railway Company, Defendants. } No. 64280.

63 Pursuant to the verdict of the jury in the above-entitled action, duly rendered and filed on the 23rd day of April, A. D. 1897,

Now, on motion of Messrs. John A. Lovely and J. F. George, said attorneys, it is hereby ordered that the plaintiff herein recover of said defendants, H. F. Whitcomb and Howard Morris, receivers of the Wisconsin Central Railway Company, and each of them, the sum of twelve thousand seven hundred thirty-eight and $\frac{20}{100}$ dol-

lars damages with one hundred eight and $\frac{00}{100}$ dollars costs and disbursements, in all amounting to $12,846.20.

Signed this 31st day of July, A. D. 1897.

EDWARD G. ROGERS, *Clerk.*

Filed July 31st, 1897.

STATE OF MINNESOTA, }
County of Ramsey. }

District Court, 2nd Judicial District.

JOHN SMITHSON
vs.
H. F. WHITCOMB and H. MORRIS, Receivers of Wisconsin Central Railway Company, and Chicago, Great Western Railway Company. } 64280.

This cause came on for trial before Hon. John W. Willis, with a jury, on the morning of Tuesday, April 20, 1897.

64 J. A. Lovely and J. F. George appeared as counsel on behalf of plaintiff; Thos. H. Gill and McDonald & Barnard appeared in behalf of the receivers of the Wisconsin Central Company, and D. W. Lawler for the defendant Chicago Great Western Railway Company.

Mr. GILL: In this case we ask to file an amended answer, which is precisely the same as the original answer, except that it contains an additional plea to the jurisdiction.

Motion denied.

Exception by receivers.

Mr. MCDONALD: The notice of motion being waived by the plaintiff, it having been agreed that the hearing of the motion should come up before the court upon the calling of the case, and should be disposed of at that time the same as though it had been made on regular notice, the proposed amended answer of the defendants is as follows:

STATE OF MINNESOTA, }
County of Ramsey. }

District Court, 2nd Judicial District.

JOHN SMITHSON, Plaintiff,
vs.
CHICAGO GREAT WESTERN RAILWAY, H. F. WHITCOMB and Howard Morris, Receivers of Wisconsin Central Railway.

65 Now come the above-named defendants, H. F. Whitcomb and Howard Morris as receivers, etc., and for their separate amended answer respectfully show to this court and allege:

First. They admit the incorporation of the Wisconsin Central railway as alleged in plaintiff's complaint, and admit the appointment of these defendants as receivers as therein alleged.

Second. Further answering said complaint, defendants deny each and every allegation, matter and statement in said complaint contained not hereinbefore admitted.

Third. Defendants deny that said plaintiff was injured through the carelessness or negligence of these defendants, and allege that if he was injured at all, it was through his own carelessness and negligence and the carelessness and negligence of his fellow-servants employed with him and deny that by reason of any carelessness or negligence on the part of these defendants, said plaintiff has been damaged in the sum of twenty-five thousand ($25,000) dollars or any other sum.

Fourth. And for further answer these defendants allege and show to this court that this court is wholly without jurisdiction to hear, try and determine the matters at issue in this action for the reason that the matter has heretofore been properly removed to and is now only properly and lawfully pending in the circuit court of the United States for the district of Minnesota, third division.

Wherefore defendants demand that said plaintiff take
66 nothing by his pretended cause of action so far as they are concerned, and that they have judgment for their costs and disbursements herein.

McDONALD & BARNARD,
Attorneys for Defendants.

(Verified.)

Jury called and sworn and case opened to the court and jury in behalf of plaintiff by Mr. Lovely.

JOHN SMITHSON, sworn as a witness in his own behalf, testified as follows:

Examined by Mr. LOVELY:

Mr. GILL: If the court please, the defendants, the receivers, desire to enter an objection to the offer of any evidence under the pleadings, first, for the reason that the court is without jurisdiction because having been properly removed and now properly pending in the circuit court of the United States for the district of Minnesota; and second, because the complaint does not state facts sufficient to constitute a joint cause of action in that it improperly joins two causes of action.

The COURT: The objection is overruled.

Exception by receivers.

Q. Your name is John Smithson?
A. Yes, sir.
Q. Are you a married man?
A. No, sir.
Q. Where do you live?
A. White Rock, Minnesota.
Q. What county is that in?
A. Goodhue county.

67 Q. Near Red Wing or Hastings?
A. Oh, it is about sixteen miles from Red Wing, and about twenty miles from Hastings.
Q. At White Rock, in Goodhue county?
A. Yes; my parents live there.
Q. How long have you resided there?
A. Twenty-two years.
Q. You are by occupation a railroad man?
A. Yes, sir.
Q. How long have you been engaged in railroading?
A. About three years.
Q. Now or at the time of the injury?
A. Before the injury.
Q. When were you injured?
A. March 7, 1894.
Q. About three years ago?
A. Yes, sir.
Q. Previous to your injury you had been in the railroad business three years?
A. Yes, sir.
Q. For what company had you been working?
A. Chicago, Great Western.
Q. In what capacity?
A. I worked about six months as wiper; a little over two years firing.
Q. You were in their employ as a wiper?
A. Yes.
Q. And then went on the road, I suppose?
A. Yes.
Q. Firing on a freight engine or upon a passenger engine?
A. Freight engine.
Q. At the time of your injury, what was your run?
A. From Chicago to Dubuque, Iowa.
Q. From Chicago to Dubuque, Iowa, on the Great Western road?
A. Yes, sir.
68 Q. Where did you get your engine on that run?
A. The Robey Street round-house.
Q. How near Chicago is that?
A. I couldn't say exactly; maybe two miles from the center of the city.
Q. And what would you do with that engine when you got it there?
A. We would take it out to Central avenue and connect it with our train.
Q. How far is it from Central avenue to Robey street—Robey street to Central avenue?
A. Well, I couldn't say exactly; probably three miles.
Q. How large was this round-house at Robey street, how many stalls for engines were there in it?
A. I couldn't say just how many; probably a dozen.
Q. What engines occupied that round-house?

A. Chicago, Great Western and Wisconsin Central and Chicago & Northern Pacific, I think.

Q. Do you know how many engines of the Great Western usually were stalled there?

A. No, I couldn't say just how many.

Q. Your engine was stalled there?

A. Yes.

Q. And some engine- of the Central?

A. Yes, sir.

Q. You speak of the Chicago & Northern Pacific; what was that company?

A. Terminal company.

Q. Do you know what it was?

A. It was a terminal company—railroad.

Q. Had engines?

A. Yes, sir.

Q. Do you know what the custom was about taking out
69 engines to go out on the road from this round-house, at that time?

A. Yes, sir, it was customary.

Q. You know it, tell us about it.

A. Well, it was customary to take the engines out and the crews were called for the engines. They took the engines, went to Central avenue and connected with their trains,—went from there on.

Q. What was your custom? Was that the custom of your company?

A. Yes, sir.

Q. And of any others?

A. Yes, the Wisconsin Central.

Q. You say it was three miles from there to Central avenue?

A. About that, I think.

Q. How near this round-house was the main track?

A. Oh, probably a couple of hundred feet.

Q. How many tracks were there there?

A. Two.

Q. What direction did these main tracks run, the general direction?

A. Westerly.

Q. Easterly and westerly?

A. Yes.

Q. The trains would come in over one and go out over the other?

A. Yes, sir.

Q. Now, with reference to those main tracks extending easterly and westerly along there, were there side tracks on either side?

A. Yes, sir.

Q. A number of them?

A. Yes, sir, quite a number.

Q. Then when you took your engine—when you went out with your engine to Central avenue and hooked on to the train, what would you do then,—go out on the voyage?

A. Yes.

70 Q. To Dubuque. The trainmen would be placed?
A. Yes, sir.
Q. Well, now, what was your ordinary leaving time by run at night or evening? What was your number, the number of your train?
A. 73.
Q. And it was a freight -rain?
A. Yes, sir.
Q. What was its schedule leaving time?
A. 8.40 at Central avenue.
Q. That was the starting point?
A. Yes, sir.
Q. Preliminary to that, the train went out (the locomotive) it was to leave at 8.40?
A. Central avenue for taking this train.
Q. Who was your engineer at that time?
A. Mr. Larson.
Q. What other trainmen, if any, were there on that 73 run, run of 73?
A. There was a conductor and two brakemen.
Q. Tell me their names.
A. Conductor Long, Brakeman Long and Brakeman Frazier.
Q. Where did you get those men?
A. Got them at Robey street.
Q. At Robey street they went out with you?
A. Yes, sir.
Q. When you went out to Central avenue was it your custom to go out on the main track or on one of these side tracks?
A. On the main track.
Q. Always?
A. Yes, sir.
Q. About how far from the round-house, after getting out of the round-house, did you strike this main track and go on?
A. Oh, probably a couple of hundred feet.
71 Q. From there you kept the main track?
A. Yes.
Q. And on that main track I understood you to say all trains and all engines went in the same direction as yours?
A. Yes, sir.
Q. According to the custom; about what time did you usually go out to start on your voyage—No. 73?
A. From the round-house?
Q. Yes.
A. We were called for 8.20.
Q. You were called for 8.20?
A. Yes, sir.
Q. And from 8.20 you had to get out there at 8.40?
A. Yes, sir.
Q. And get onto your train? Do you know what the time was according to the schedule time of running?
A. No, I do not.

Q. You don't?
A. There was no schedule time for running.
Q. That is, before you got there?
A. No.
Q. Well, as fireman, what were your duties, at the round-house and from the round-house to Central avenue?
A. They were to fire the engine and ring the bell when it was necessary.
Q. What else?
A. Why, that was all.
Q. Did you look out, have a lookout?
A. Yes—lookout.
Q. Who had charge of the movements of the engine?
A. The engineer.
Q. I think you said Mr. Larson was engineer on this engine?
A. Yes, sir.
Q. At that time?
A. Yes, sir.
Q. How long had you been running with Mr. Larson?
72 A. I don't just remember; probably a year, maybe less, I couldn't say. I had been fireman quite a while.
Q. Where would the trainmen be while on the run out there?
A. When we were going out?
Q. Yes.
A. Why, Mr. Long (conductor) was sitting on the seat box and the brakemen were standing in the gangway.
Q. They were all on the engine?
A. Yes.
Q. Now, with reference to the time of leaving and the act of leaving the round-house—was your engineer and that crew to go out to Central avenue and would other engines go out of the round-house at or about that time and go in the same direction?
A. Yes, sir.
Q. What engine?
A. Do you mean the number of the engine?
Q. I mean what engine.
A. Wisconsin Central freight engines, switch-engines.
Q. When your engine would go out on this 8.40 run was there at or near that time an engine of another company that would go out of the round-house?
A. Yes, sir; one on the Wisconsin Central.
Q. That is the engine operated by these receivers?
A. Yes, sir.
Q. About what time with reference to your time of leaving—the time of your engine leaving the round-house—would this Wisconsin Central engine usually go out?
A. Why, they generally went out behind us.
Q. Always?
A. Unless we were delayed for some reason.
73 Q. How much behind?
A. Why, I don't know.

Q. Would they occasionally pass you on the track or would you get out of the way before they did?

A. We generally got there before they did.

Q. Do you know what the business or purpose of this engine which usually went out about that time (of the Wisconsin Central receivers) was?

A. Yes, sir. It was to go out to get a train, the same as we.

Q. To get a train where?

A. At 48th street, between Central avenue and 48th street.

Q. How would they do to get it?

A. They would go out to Central avenue, cross over the double tracks and go in the yard.

Q. And pull out their train?

A. Yes, sir.

Q. Where would that train go to?

A. I suppose to Waukesha. I never run on the road.

Q. It went out to the end of their division? Well, the time that you were allowed, I understand, to get out to Central avenue, make up your train—the train would be made up, I presume——

A. Yes, sir.

Q. Is that a fact?

A. Yes, sir.

Q. —to get your train and pull out and get started—would be about twenty minutes?

A. Yes, sir.

Q. Have you any idea of the leaving time of the Wisconsin Central from 48th street?

A. I think 9 o'clock.

Q. Twenty minutes after yours?

A. Yes, sir.

74 Q. Was there anything unusual or peculiar in leaving on your part or on the part of your engine or the engineer or anybody handling it on the night of your injury?

A. Anybody handling it?

Q. Was there anything peculiar? Did it leave in the regular way?

A. No; we were a little late.

Q. About how much late?

A. Well, I think we left there about 8.40.

Q. Who had the direction of the leaving of the train?

A. Why, the engineer.

Q. The conductor and brakemen were on your engine when you went out that night?

A. Yes, sir.

Q. In directing the movement, and all that, of the engine, controlling it, who controlled it until they got to Central avenue?

A. The engineer.

Q. Did you see any Wisconsin Central engine that night after you got on——

A. Yes, sir.

Q. And got your engine out of the round-house?

A. Yes, sir.
Q. You left the round-house at 8.40?
A. Yes, sir.
Q. Where did you go when you left the round-house with your engine, where did your engine go?
A. It went to Central avenue.
Q. Did it stop anywhere?
A. Yes, sir.
Q. Or did it proceed right out of the round-house?
A. It stopped at railroad crossings.
75 Q. It went out in the usual course that you have described, did it?
A. Yes, sir.
Q. Onto the main track and towards Central avenue?
A. Yes, sir.
Q. You were on the engine that night?
A. Yes, sir.
Q. Where were you at that time on the engine?
A. The time of the collision?
Q. Well, yes, from the time you got on at Robey street?
A. Exercising my duties, firing some time; some time I was sitting.
Q. On that occasion?
A. Yes.
Q. Where is the fireman's place on the engine?
A. It is wherever his work requires him, sometimes firing——
Q. He has a seat, doesn't he, that he is on?
A. Yes, he has the left-hand side of the engine.
Q. And where is the engineer's seat?
A. The right hand.
Q. Where was the engineer at that time when you left the round-house on that occasion, was he at his place?
A. Yes, sir.
Q. What was he doing?
A. Why, he was running the engine as usual.
Q. What was you doing there, if you can tell?
A. Why, I put in fire whenever it required it, and when I had time I would get up on the seat and look out—ring the bell where it was necessary.
Q. You were engaged constantly, were you?
A. Yes, sir.
Q. Until the collision occurred?
A. Yes, sir.
76 Q. Now, when you went out from the round-house, after leaving time, at your place, and the engineer at his, did you see the Wisconsin Central engine with which you collided?
A. No, sir.
Q. Didn't you see it before you left?
A. Yes, sir. It pulled out ahead of us.
Q. That is what I want to know; it pulled out ahead of you?
A. Yes, sir.

Q. How much ahead of you?
A. Well, probably ten or fifteen minutes.
Q. From ten to fifteen minutes it pulled out ahead of you?
A. Yes.
Q. Was anything said there by any one? You needn't state what it was.
A. No. The engineer of the other engine came over and asked me if I wouldn't back up to let them out ahead of us. I was standing up next to the switch to the main line and I jumped off the engine and Mr. Larsen was in the switch shanty to see where the brakeman was, and I asked him if I would back the engine up; he says, "Yes, back up and let them go out." So I backed it up and they went out ahead of us. That was the last I saw——
Q. You were coaled up, ready to go out there?
A. Yes, sir.
Q. And you backed up and let this other engine go ahead?
A. Yes, sir.
Q. Some ten or fifteen minutes after, your engine proceeded to go out?
A. Yes, sir.
Q. When was the first knowledge that you had of any engine being on the track ahead of you?
77 A. When I saw the headlight shining on the tender.
Q. Where were you?
A. I was on the deck at the time.
Q. We don't all know what that is.
A. On the deck of the engine where the fireman stands.
Q. It is the floor where the fireman stands so as to look out?
A. Yes.

Court here adjourned until Wednesday morning, April 21.

JOHN SMITHSON, recalled, testified:

By Mr. LOVELY:

Q. Mr. Smithson, you may state how far your engine was from the object ahead of you on the track when you first saw it.
A. About three car-lengths, I should think.
Q. What was it that you saw three car-lengths ahead of you?
A. The tender of the engine.
Q. Did you observe anything on the tender, any light or anything of that kind?
A. No, sir.
Q. About what is a car-length distance? We don't all know.
A. About forty feet, I should think.
Q. About how fast was your engine going when you were——
A. About twenty miles an hour.
Q. Was that the rate of speed they usually run at that point?
A. Yes, sir.
Q. Now, have you any occasion to know from any exami-
78 nation that you made or what you saw at that time or what you know afterwards as to where that engine ahead of you was at that time on the track?

A. Well, it was at a point we call Robinson's ditch, about.

Q. Mr. Smithson, can you tell how far that place called Robinson's ditch is from any other point, Central avenue or 48th street?

A. It is about half way between Central avenue and 48th street.

Q. What distance from either point?

A. About half a mile. It is a mile between the streets.

Q. Central avenue is a street?

A. Yes, sir.

Q. And 48th street?

A. Yes, sir.

Q. Do you know whether or not that was the usual stopping place for that engine?

A. It was not.

Map shown witness.

Mr. LAWLER: This is Central avenue; this is Robinson's ditch; this is 48th street. By the scale it is half a mile from 48th street to Robinson's ditch and also half a mile from Robinson's ditch to Central avenue.

Mr. LOVELY: That is correct.

Q. This point where this dagger is is the point where that engine was?

A. Yes, sir.

Map considered as marked Pl'ff's Ex. A.

Q. About how soon after you saw the tender (headlight) was there a collision?

A. It was a few seconds.

Q. What was done on the engine? Go on and tell the
79 jury. Tell now what happened right there.

A. As soon as I saw it, I stepped out onto the gangway and the brakemen were standing on each side of the gangway. I told them to look out for themselves——

Mr. GILL: Don't tell anything you spoke of.

Q. You may state whether or not you cried out. You needn't state what you said.

A. I gave them notice, told them that there was something ahead, and they both jumped off.

Q. How?

A. And they both jumped off. And the engineer called for brakes and reversed and applied his air; and I stepped into the gangway and caught hold of the handle of the tank and on the cab. I was about to let myself off when they struck.

Q. How hard did they strike?

A. Well, struck nearly full force, at the rate we were going.

Q. What effect did that have upon you? Go on and tell us, Mr. Smithson, just what occurred there.

A. It threw me to the ground. It kind of—having hold of the handle of the tank and on the cab, it threw me right behind the drivers, I think. I was knocked senseless at that point.

Q. What are the drivers?
A. The drive-wheels of the engine.
Q. The forward wheel?
A. Well, the three main connecting wheels of the engine.
Q. Where did I understand with reference to these drivers it threw you?
A. In behind them, between them and the tender.
Q. Did you know anything more?
A. No, sir.
80 Q. From the time you struck the main track of the railroad until you got to the place of collision, did you see ahead of you any signal whatever?
A. No, sir.
Q. Was there any?
A. No, sir.

Mr. GILL: I object to that question as a conclusion and as incompetent, irrelevant, and immaterial, and I move to strike out the answer, the answer having been given before the objection was made.
Motion granted.

Q. How much of the time previous to the striking were you looking ahead?
A. About a minute.
Q. Do you know what the custom was at that time in giving signals to protect trains and engines passing over those tracks where such engines stop when they stop?
A. Yes, sir.
Q. What was the custom?
A. It was to send a flag up, a man out to flag the train.
Q. On what occasions?
A. I don't understand that.
Q. As to the stoppage of an engine or train.
A. Always send a flag back to the back, to the rear end.
Q. As to the length of time, did it make any difference?
A. Why, as soon as possible—as soon as they could get around to send one.
Q. You talk about a flag—what do you mean by that?
A. Send a man back with a lantern in the night or flag by day.
81 Q. Did you see any such man on that occasion?
A. No, sir.
Q. Was there anything to obstruct your vision between your point of observation and the locomotive which your engine struck?
A. No, sir.
Q. Your eyesight is pretty good——
A. Yes, sir.
Q. —or poor? You may go on and tell us what next you knew or how soon you knew anything after you were injured?
A. Well, the first that I knew is when the brakeman was picking me up from the track.
Q. What brakeman was that?

A. Brakeman Frazier. Part of the time I was conscious and part of the time I was unconscious. He carried me across to a caboose in the yard. Took me down to Robey street.

Q. How did he take you down to Robey street?

A. Why, I was told afterwards——

Mr. GILL: Never mind; just what you know.

Q. You don't know yourself?

A. No, sir.

Q. Go on and tell us about your leg, when you first knew about it?

A. I first knew it when I got in the caboose.

Q. What was its condition?

A. It seemed to be run over in this shape, across this way, and when I first looked at it, this knee-cap and bones were all sticking up in that shape (illustrating).

Q. Did you suffer pain at that time?

A. Yes, sir.

82 Q. To what extent did you suffer pain, how much?

A. About as much as anybody could suffer, I guess.

Q. Where did you go, where were you taken?

A. To the Presbyterian hospital.

Q. Presbyterian hospital in the city of Chicago?

A. Yes, sir.

Q. How long did you remain in the Presbyterian hospital?

A. About eleven weeks.

Q. Your leg was amputated, was it, there?

A. Yes, sir.

Q. You may tell the jury—stand up there and just show them about—which leg was it that was injured.

A. Right leg.

Q. What point? Indicate to the jury what point, where it had to be amputated?

A. Well, about probably six inches about the knee.

Q. Have you done any work since then?

A. No, sir.

Q. When you were discharged from the Presbyterian hospital, where did you go?

A. I went home.

Q. To White Rock?

A. Yes, sir.

Q. Have you done any work since?

A. No, sir.

Q. Do you experience any trouble or pain or difficulty in your injured limb?

A. Yes, at times, have considerable trouble with it.

Q. In what way?

A. Well, pains—shooting pains, seems to go down through the part that was gone.

83 Q. Does the weather affect it to any extent?

A. Sometimes.

Q. From the time of your injury, during the period you were in the hospital, did you suffer pain to any extent?
A. Yes, sir.
Q. To what extent? Describe it—while you were there.
A. Well, I suffered day and night, nearly all the time.
Q. How often did your limb have to be dressed?
A. Every day.
Q. How long did it take to dress it?
A. Probably an hour.
Q. Was that experience in dressing the limb painful or not?
A. Yes, sir.
Q. How much painful, a good deal or little?
A. A good deal.
Q. Did the effect of this amputation, suffering there—did it affect your rest, your sleep?
A. Yes, sir.
Q. And when you had this limb amputated were you under the influence of anæsthetics?
A. Yes, sir.
Q. That is, chloroform or ether?
A. Ether.
Q. It was performed by a physician there?
A. Yes, sir.
Q. Previous to this, were you a healthy, strong man?
A. Yes, sir.
Q. What wages were you earning at the time you were injured?
A. It would average about $80 a month probably.

84 Cross-examination.

By Mr. LAWLER:

Q. You were injured on the 7th of March, 1894, were you, Mr. Smithson?
A. Yes, sir.
Q. How long had you been working for the Chicago, Great Western Railway Company at that time?
A. Going on three years.
Q. How long had you been on the run between Chicago and Dubuque?
A. About two years.
Q. In the capacity of fireman during those two years?
A. Yes, sir.
Q. That is known as the Chicago division, is it not?
A. Yes, sir.
Q. The run from Chicago, in the State of Illinois, to Dubuque, in the State of Iowa?
A. Yes, sir.
Q. And all of that division is in the State of Illinois, is it not, except the bridge which crosses the river at Dubuque?
A. Yes, sir.

Q. Where did you reside during those two years, Mr. Smithson?
A. In Chicago.
Q. Do you remember the number—I don't suppose you had any one address there all the time but you resided in Chicago, did you, during those two years?
A. Yes, sir.
Q. You have spoken about a terminal company, about these tracks that you were running on when you were hurt, being the tracks of the terminal company. What was the name of that company, Mr. Smithson?
A. Chicago & Northern Pacific.
85 Q. Was it (I am just trying to assist your memory) the Northern Pacific or the Chicago & Northern Pacific?
A. Chicago & Northern Pacific.
Q. That was a company whose business it was to furnish terminal facilities to different tenant railroad companies using them there at Chicago, wasn't it?
A. Yes, sir.
Q. And as I believe the testimony shows, those facilities were used by the Chicago, Great Western and Baltimore & Ohio and Wisconsin Central roads.

Mr. GILL: And the Chicago & Northern Pacific.

Q. And the Chicago & Northern Pacific?
A. Yes, sir.
Q. The first thing that you knew of the presence of the Wisconsin Central engine ahead of you at Robinson's ditch was when your headlight shone on the rear of the Wisconsin Central engine, was it?
A. Yes, sir.
Q. Were you looking out for a signal just before you got to the engine?
A. Yes, sir.
Q. You were on the watch-out for a signal, were you?
A. Yes, sir.
Q. What sort of a signal were you expecting, if any, Mr. Smithson?
A. It would be a flagman, if any.
Q. It would be a flagman or what else? Would there be any signal that you would be expecting to see on the engine itself?
A. The cross-over switch at Central avenue.
86 Q. But I mean with reference to the engine itself, the Wisconsin Central engine—would you have a right to expect any signal on that?
A. Yes, sir.
Q. What would that signal be?
A. It would be two red lights.
Q. Two red lights at the rear of the engine?
A. Yes, sir.
Q. You have testified in regard to the custom as to giving signals from one engine to another and also by sending out a man with a

flag and you explained that by sending out a man with a flag and also sometimes sending back a man with a lantern?

A. Yes, sir.

Q. That is your explanation, is it?

(No answer.)

Q. State whether or not that custom that you have testified to was due to any rule that the railroad operators were expected to observe?

A. Yes, sir, it was.

Q. It was due to the rule, was it?

A. Yes, sir.

Q. The rule of what company was that? In other words, under what rules were you running when you were running on the track in question where this accident took place?

A. Under the Chicago & Northern Pacific rules.

Q. That company made rules for the operation of trains and for the giving of signals which were supposed to be observed by the tenant companies, did it?

A. Yes, sir.

87 Q. Of which the Chicago, Great Western Railway Company was one?

A. Yes, sir.

Q. You were familiar with the rules that were in force at that time, were you?

A. To some extent, yes.

Q. These rules, as I understand it, were made by the Chicago & Northern Pacific to be agreed on by the companies using the lines and then given out to the men for their instruction and guidance, were they not?

A. Yes, sir.

Q. Just examine this document and see whether it is the time-table and rules of the Chicago & Northern Pacific Railroad Company and its branches governing the tracks in question and in effect on March 7, 1894. You can compare that with the other one, if you want to.

A. What is the question now?

Q. Whether that is the time-table and rules of the Chicago & Northern Pacific Railroad Company, the terminal company which has been testified to, which were in effect on March 7, 1894?

A. Yes, sir.

Mr. LAWLER: I desire to offer this in evidence, your honor. I want to offer it all and then I will call the attention of the jury to certain parts of it.

Time-table marked Def'ts' Ex. 1.

Mr. LOVELY: I have no objection to it.

Mr. GILL: Are we to have the benefit of this, too, or have we to introduce it again?

The COURT: Whenever an exhibit is admitted, you can say we desire—

88 Mr. GILL: Call it then Def'ts' Ex. No. 1.

Q. These rules, as I understand it, and time-table, were furnished

by the Chicago & Northern Pacific Railroad Company to the employés who were operating the trains over the tracks at that place, were they not?

A. Yes, sir.

Q. Furnished the engineers, conductors, and firemen?

A. They never gave me any.

Q. You didn't have any?

A. No.

Q. But they were furnished the engineers and conductors, were they?

A. Yes, sir.

Q. For their guidance?

Mr. LAWLER: I desire to call the attention of the jury to certain rules here, your honor, and it may be important for the purpose of preserving them to read them. There are only four or five.

Mr. LOVELY: I have no objection to it.

The COURT: You may do so.

Mr. LAWLER: Heading: "Train signals. Rule 34. Each train running after sunset, or when obscured by fog or other cause, must display the headlight in front, and two or more red lights in the rear. Yard engines must display two red lights, except when provided with a headlight, on both front and rear."

Rule 78. "All signals must be used strictly in accordance with the rules, and trainmen must keep a constant lookout for signals."

Then heading "Classification of trains." Rule 79. "All trains are designated as regular or extra. Regular trains are those represented on the time-table, and may consist of one or more
89 sections. All sections of a train, except the last, must display signals as provided in rule No. 36. Extra trains are those not represented on the time-table, and may be run without notice. An engine without cars, in service on the road, shall be considered a train."

Rule 120. "Conductors and enginemen will be held equally responsible for the violation of any of the rules governing the safety of their trains, and they must take every precaution for the protection of their trains, even if not provided for by the rules."

Rule 121. "In all cases of doubt or uncertainty, take the safe course and run no risks."

Rule 127. "Inasmuch as trains may be expected at any time to be entering the yards or sidings, or to stop at any point without reference to schedules, and as switches are constantly in use, engineers or conductors running trains or engines between Chicago and Central avenue must at all times so control their trains or engines as to be able to stop within the range within which an obstruction of the track and the position of switches can be plainly seen; but nothing in this will be held as an excuse for the failure to display proper signals when trains or engines are held on the main track, and men in charge of trains or engines when in danger of being overtaken by another train, must protect themselves by flags, lamps, fusees or torpedoes, promptly, to avoid all possibility of being run nto."

90 Q. Now, Mr. Smithson, I want to call your attention to rule 127, the rule that I have just read?

A. Yes, sir.

Q. And state whether under that rule you didn't have the right to expect that the Wisconsin Central engine would either be protected by sending back a flag, as you have described, or by torpedoes or fusees placed on the track, according to the rules. You had a right to expect that, didn't you?

A. Yes, sir.

Q. State whether or not you heard any torpedoes or whether any fusee was set out or anything of that sort.

A. No, sir; I heard nothing.

Q. Just explain what torpedoes are and fusees, Mr. Smithson, and what office they perform in railroad business.

A. The torpedo is a thing they have to put on the track such a distance from the engine in case of fog or to give a signal to the following train that there is something ahead; the same with the fusee.

The COURT: Tell the jury what it does.

WITNESS: It explodes, and it is heard by the train and run over by the——

Mr. LOVELY: It must make a loud noise, then.

Q. What is a fusee, what office does that perform in the operation of trains and with regard to giving signals?

A. It is the same as a torpedo. If you see one burning on the track, you must look out ahead for something.

Q. By whom are they supposed to be put out when they are put out?

A. By a flagman.

Q. All those matters are explained by these rules to which we have specifically referred.

91 Cross-examination.

By Mr. GILL:

Q. Mr. Smithson, I wish you would take this Ex. 1, being the rules that have been offered in evidence, and look on page 9 about the center of the first column of the printed matter. State whether or not there is contained as one of the rules mentioned, the following rule: "All engines and trains, in either direction, must approach Morgan street, Center avenue, Lincoln street, Robey street and Central avenue not to exceed four miles per hour, prepared to stop if main track is not clear. This, however, will not excuse switching crews from using every precaution to protect their train using main tracks." That was one of the rules then in force, was it?

A. Yes, sir.

Q. Now, the second paragraph below that, state whether or not, reads as follows: "Engines, delayed regular trains, and all irregular trains must keep a sharp lookout for switch-engines within yard limits."

A. Yes, sir.

Q. Next below that is there this rule: "Engines and trains must approach all cross-overs with the utmost caution (especially those at the end of the different yards,) expecting to find them occupied. This rule is not intended to relieve trainmen from properly protecting their trains when using cross-overs. Under no circumstances must a train be permitted to stand on a cross-over longer than is absolutely necessary." That was one of the rules, too, was it?

A. Yes, sir.

92 Q. The Wisconsin Central engine was operating under these same rules, was it?

A. I think so.

Q. As one of the tenant companies?

A. Yes, sir.

Q. All of the tenant companies?

Mr. LOVELY: We admit that.

Q. Turn over to the rules on the back page, rule No. 105 near the bottom of the second column,——

A. Yes, sir.

Q. —of the last page. "A train starting from a station, or leaving a junction, when a train of the same class running in the same direction is overdue, will proceed on its own time and rights, and the overdue train will run as provided in rule No. 88 or No. 89." Was that in force at that time?

A. Yes, sir.

Q. Now turn to rule No. 88. Does it read as follows: "Passenger trains running in the same direction must keep not less than five minutes apart, unless some form of block signal is used."

A. Yes, sir.

Q. Rule 89. "Freight trains following each other must keep not less than five minutes apart (except in closing up at stations or at meeting and passing points), unless some form of block signal is used."

A. Yes, sir.

Q. Was there any block signal used west of 48th street?

A. No, sir.

Q. Was the Robey Street round-house the only round-house that there was on the terminal?

A. No, sir.

93 Q. Where was the other round-house?

A. At Twelfth street.

Q. Is that east or west of Robey street?

A. East.

Q. How far?

A. About three miles or less.

Q. What was it used for?

A. Mostly for passenger engines, I think.

Q. Did your freight engines or the Wisconsin Central freight engines ever use it?

A. I don't know.

Q. What was the object in registering out of the Robey Street round-house when you left there?

A. I don't know as they did.

Q. Were you at work there two years upon that same run and did you not know whether or not each engine in going into or leaving the round-house for regular work would register in a registry kept in the round-house?

A. Yes, sir.

Q. What was the object of registering out when you started for your train at Central avenue?

A. That was the time they were called for.

Q. The time they left the round-house, was it?

A. Yes, sir.

Q. What time did you say you were due to leave the round-house?

A. Called for 8.20.

Q. What time was your train to leave Central avenue?

A. 8.40.

Q. And you then had twenty minutes to go from Robey street to Central avenue, back in on your train, couple up and get ready to start?

A. Yes, sir.

94 Q. Was your train what was called an extra or wild train, at that time, between Robey street and Central avenue? Was it an extra or wild train?

A. It was an extra.

Q. It had no rights as a regular train, did it, until it reached what point?

A. Central avenue.

Q. Were you carded from Central avenue on the time-table?

A. Yes.

Q. Were you carded on this time-table as a regular train from Central avenue?

A. I don't know. On our own time table we was.

Q. But how far did you run on those tracks west under the control of the Chicago & Northern Pacific and under these rules you have spoken about?

A. From Central avenue to Forest Home.

Q. You run all the way from Robey Street round-house to Forest Home under these rules?

A. Yes.

Q. So, if you were a regular train on the Chicago & Northern Pacific, you would be carded in this time-table, would you not?

A. I think so.

Q. If you were not carded in this time-table, you were an extra train until you struck Forest Home?

A. Yes, sir.

Q. And at Forest Home you struck your own tracks, the Chicago, Great Western tracks?

A. Yes, sir.

Q. Then you were an extra train on the Chicago & Northern Pacific tracks from Robey street to Forest Home?

A. I think so.

95 Q. An extra train on the Chicago & Northern Pacific until you struck your own tracks at Forest Home and then you commenced on your own time-card and under your own rules?

A. Yes, sir.

Q. How far is it from 48th street to Central avenue, did you say?

A. One and one-tenth miles.

Q. How far from Central avenue to Forest Home?

A. It is three miles and a half.

Q. It is not quite three miles, is it—two and a half miles?

A. Yes, two miles and a half.

Q. What do you mean by an extra train?

A. Extra trains are trains that have got no time on the time-table.

Q. From the time that you were bulletined to leave the Robey Street round-house at 8.20 until you reached your yard or your freight train at Central avenue at 8.40, was there any other train carded on that time-table?

A. I couldn't say.

Q. Do you know whether or not any suburban train was carded at that time passing over the points between Robey street and Central avenue?

A. No, sir; I never looked it up.

Q. You don't know?

A. No, sir.

Q. Were you ever brakeman on any regular suburban train at that time in your run?

A. I don't remember whether there was or not.

Q. You don't remember of ever having been, do you?

A. No, sir.

Q. How many tracks are there on the main tracks?

A. Two.

Q. All the way from Robey street to Forest Home?

A. Yes.

96 Q. What was the purpose of the two main tracks?

A. One was an incoming and the other was an outgoing.

Q. What do you mean by incoming and outgoing?

A. Trains coming in comes in on the right-hand track and the ones going out goes on the left-hand track.

Q. And this place then, the outgoing track and the track which you were on at the time was the north track?

A. Yes, sir.

Q. And the incoming track would be the south main track?

A. Yes, sir.

Q. Were there any yards between 48th street and Central avenue on the north side of those main tracks?

A. No, sir.

Q. Where were the yards?

A. They were on the south side.

Q. Which was the first yard proceeding west from 48th street toward Central avenue that you would come to?

A. Wisconsin Central yard.

Q. What was the next?

A. Chicago, Great Western.

Q. So that in coming to those yards for your train you would have to pass where the Wisconsin Central engine had its train, would you not?

A. Wisconsin Central yards—yes, sir, we would have to pass their yards.

Q. How did you become aware of these rules you have testified to here?

A. I read them.

Q. So that you were familiar with them before the time of this accident?

A. Yes, partly.

97 Q. Were you familiar with the rules that I have read to you in regard to the operation of trains?

A. Yes, sir.

Q. It was your duty to be, wasn't it?

A. Well, partly.

Q. You as fireman were obliged to take signals and such things?

A. Yes, sir.

Q. And keep a lookout in the way in which you were going?

A. Yes, sir, when I had time.

Q. The engineer was also to keep a lookout?

A. Yes, sir.

Q. How do you know anything about the operation of the Wisconsin Central engines except on this night, as to the method it adopted in getting to its train?

A. Well, I have seen it leave the round-house.

Q. Didn't you always leave the round-house before it?

A. I did when I was on that train.

Q. Weren't you always on that run?

A. No, sir.

Q. Always on that division?

A. Yes, sir.

Q. When is there any other train or engine of the Chicago Great Western leaving Robey Street round-house at or about the time of the Wisconsin Central engine?

A. I forget now, but generally there was not any that left before 11 o'clock, somewheres along there.

Q. From what you would have seen of that Wisconsin Central engine after it left Robey Street round-house would be only as far as the crossing?

A. At Central avenue.

Q. How would you see it at Central avenue?

A. I wouldn't see it if we left ahead of it.

98 Q. Were there many days that it left ahead of you?

A. I don't know as I had any occasion to see it leave ahead of me before.

Q. Then why do you say as to the method adopted by them in running to the 48th Street yard, as you testified in answer to counsel upon the other side, yesterday, that you knew how they operated?

A. Why, from what I heard them say.

Q. You don't know anything about that yourself, do you? You never saw them before leave ahead of you?

A. No, I never saw them leave ahead of me.

Q. You never saw them leaving behind you because your train would be gone before you could——

A. Sometimes I would be around the round-house.

Q. I mean at Central avenue?

A. I have seen them pull out of Central avenue. I worked on switch-engines around there. I seen them pull out.

Q. You didn't switch on any switch-engine within two years before that?

A. Yes, sir.

Q. Didn't you say to Mr. Lawler in his cross-examination that you had been on this one run for two years?

A. No, sir.

Q. What was it you said?

A. I said I had been on that division. Sometimes I would be called on a switch-engine for a night; sometimes I would be on the road.

Q. You are familiar with the operation of switch-engines of that road, are you?

A. Partly, yes, sir.

99 Q. How long had you worked on the switch-engine in that yard?

A. I might work a night or two days—a month—and then be called on the road.

Q. But in order to do your work properly you had to be familiar with all the rules governing switch-engines on the road?

A. Yes, sir.

Q. A fireman on a switch-engine has a good deal more to do than a fireman on a regular engine, as to taking the signals?

A. They hardly ever give a signal on an engine in Chicago.

Q. Don't they on approaching a curve?

A. In case of a curve they do.

Q. Doesn't the fireman often take the signal when the engineer is busy with something else?

A. There is times.

Q. You say that the rule provided that if an engine or train stopped upon a main track it should send back a signal by night or day—a flag by day and lantern by night?

A. Yes, sir.

Q. Does that mean whenever they stop on the main track?

A. Yes, sir.

Q. Where did you first stop on the main track after you left Robey Street round-house on your way to Central avenue?

A. We stopped at Twelfth Street railroad crossing.

Q. Did you send back a man to flag there?

A. No, sir.

Q. It wasn't customary, was it?

A. No.

Q. This rule don't apply to engines that stop in that way?
A. Not at railroad crossings.
Q. Where did you next stop?
100 A. Stopped at—I don't know the number of the street. There is another railroad crossing pretty near to 48th street.
Q. You mean by the Twelfth Street crossing, the belt line, near the Pan Handle track. There is another near 48th street?
A. Yes.
Q. Is that the belt line?
A. I think so.
Q. You didn't send back a man to flag then, did you?
A. No, sir.
Q. At any time you should stop on the track when is the man to go back?
A. He is to go back as soon as possible.
Q. Well, as soon as he can arrange his business and get out of the train and run back with his flag?
A. Yes, sir.
Q. He is not expected to do it before the engine stops, is he?
A. No, sir.
Q. He is not expected to flag while the engine is moving at all, is he, unless they are about to stop?
A. No.
Q. As long as the engine keeps on its way, it doesn't require any flagman? It is only in case that they hold the main line unexpectedly?
A. Yes, sir.
Q. By accident or something of that kind, for any reason that they must send back a man to protect?
A. Yes, sir.
Q. They don't do that in the use of switch-engines in the yard at all, do they, when they are operating a switch-engine they don't have a man to flag unless they are on the——
A. You mean on the main line?
101 Q. On the main line?
A. Yes, sir, they always flag.
Q. They always flag when they are on the main line?
A. Yes.
Q. I mean when the switch-engine is working and using the main line in its switching work, there is no man out to flag the engine, is there, unless she is held for some reason?
A. No, sir.
Q. Unless she is on time of a regular train?
A. Yes, sir.
Q. Now, in approaching cross-overs—what are they, rather, first?
A. Cross-overs—some of them cross over from the incoming to the outgoing track, and they cross.
Q. It is merely a switch-track between two main lines?
A. Yes.
Q. So that a train on one of the main lines can cross over onto the other main track or into the yard?
A. Yes.

Q. In using cross-overs, when they stop to go in on a cross-over, do they send back a man to flag?

A. Yes.

Q. Do the switch-engines?

A. If it is necessary.

Q. What do you mean by necessary?

A. If they expect anything.

Q. If they expect anything; by that do you mean a train having rights on the track?

A. Why the rules here apply to that. It says you have to protect cross-overs.

Q. If they are holding them longer than necessary, isn't it?

A. No, sir.

102 Q. Suppose your engine on the north-bound track had to go to a cross-over at Central avenue, would you send out a man ahead of it or behind, while the switch was being thrown if you were to take it into your yard?

A. No, sir.

Q. Not any more than you would at a railroad crossing, would you?

A. No, sir.

Q. It wasn't the usual custom there at all, was it, under those circumstances?

A. Sometimes they would.

Q. Under what circumstances, if you were on the time of the regular trains?

A. Yes, or the time of any other train coming.

Q. If you saw another train following it?

A. Yes, sir.

Q. Now, Mr. Smithson, did you know whether the Wisconsin Central engine and train was a regular train on the Chicago & Northern Pacific time-table at that time?

A. Yes, sir; it was. I don't remember now——

Q. That was the engine that was coming out to get that train?

A. Yes.

Q. It was carded from what place?

A. It was carded from 48th street.

Q. So that while this was an extra, until you came to Forest Home two and a half miles west of Central avenue, the Wisconsin Central train was a regular train and had time-table rights from 48th street, a mile east of Central avenue?

A. Yes, sir.

Q. It had left 48th street at 9 o'clock, p. m., had it?

A. Yes, sir.

103 Q. How are extra trains or engines operated in the yards there with reference to other trains or regular trains?

A. They are run in between regular trains.

Q. But do they run upon the track, looking out for the ordinary regular trains and trains having rights?

A. Yes, sir.

Q. So that a train like this or an extra engine leaving west at

that time upon the main outgoing track must protect itself against any train that had carded rights at that time?

A. Yes, sir.

Q. Following it—that is, your train following the other—that is so, is it?

A. They should look out, protect themselves from carded trains?

Q. Yes.

A. Yes, sir.

Q. Didn't you see the red light on the Wisconsin Central tender as it left Robey Street round-house?

A. Yes, sir.

Q. It was there, then, wasn't it?

A. Yes, sir.

Q. Do you remember what you did from the time you left Robey Street round-house until just before the collision in and around your engine?

A. I kept up steam and——

Q. Where did you put in any fire?

A. Whenever it was necessary.

Q. The place that you put it in, if you can tell me. Put coal in just before you started?

A. Yes.

Q. Where did you put the next coal in?

A. I couldn't say.

Q. Do you know how much steam you had?

104 A. Oh, I generally carry 150 pounds or 160.

Q. You don't know whether you put in any other fire running the three miles, do you?

A. Yes.

Q. Where?

A. I don't remember.

Q. Do you remember how many you put in?

A. No, sir.

Q. Don't know how long any fire you put in before you started would last, do you?

A. Oh, no, I don't know how long it would last.

Q. Now, the conductor, as I understand you in your direct examination, was sitting on your seat-box ahead of you?

A. Yes, sir.

Q. Now, what is the character of those two main tracks as to being practically straight from 48th street west?

A. What do you mean by character?

Q. Are they straight or crooked?

A. Straight.

Q. How far does that extend easterly of 48th street?

A. Straight track?

Q. Yes.

A. It don't extend any distance; a curve at 48th street.

Q. How much of a curve?

A. Well, probably—as it shows on there.

Q. It don't show east of 48th street. Yes, this is coming east. Right at 48th, right a little west of 48th street there is a curve?
A. Yes.
Q. But the track is straight from 48th street to Central avenue?
A. Yes, sir.
Q. You didn't know that night where that engine, the Wisconsin Central engine, was situated, when it was struck, with reference to Robinson's ditch, did you?
A. I thought that we were about there.
Q. You didn't think anything about it, did you, at that time?
A. How do you mean?
Q. Didn't have time to think about that?
A. No, but a person generally knows about where they are on the road.
Q. Yes, within half a mile sometimes, and sometimes closer. You didn't see anything to locate you that night, did you?
A. Yes.
Q. What did you see?
A. The yards were right opposite me.
Q. Was there a cross-over switch between those two main tracks a short distance west of Robinson's ditch?
A. Yes, sir.
Q. Do you remember seeing a switch-light on that cross-over?
A. No, sir.
Q. Do you remember it?
A. No, sir.
Q. Do you remember whether you were ringing the bell just before this or not?
A. No, sir, I don't.
Q. Do you remember whether you put in any fire about 48th street?
A. Yes, sir, I do.
Q. Was it before or after you crossed 48th?
A. After I crossed 48th.
Q. Then after you put in the fire, you would naturally sweep your deck, would you?
A. Well, not always.
Q. What did you do after you put in the fire?
A. Why, I was going to get up on the seat.
Q. Back of Long?
A. Yes, sir; to ring the bell to go into Central avenue.
Q. Was he ringing the bell for you while you were putting in the fire?
A. No; it wasn't necessary there.
Q. You knew when this engine, the Wisconsin Central engine, passed you, or went out at Robey street, they had the red light on the tank?
A. Yes, sir.
Q. Had anybody called your attention to the obstruction before you saw it just before the collision?
A. No; I think we all saw it about the same time that I did.

Q. The Wisconsin Central engine had left the Robey Street round-house on its regular time, had it?

A. I think so.

Q. And was proceeding to the yard in the regular way to go to its train, so far as you know?

A. Yes, sir.

Q. And your engine leaving the Robey Street round-house was some few minutes late?

A. Yes, sir.

Q. Then under the rule was it not your duty to run looking out for a Wisconsin Central engine ahead?

A. No, sir.

Q. Wasn't she on her own time between there and Central avenue?

A. I don't really know.

Q. She left the round-house on time, didn't she?

A. Yes, sir.

Q. And if she was on time it was your duty, as an extra, to run looking out for her, wasn't it, under the rules?

A. I don't know.

Q. Isn't it the rule that the extra train following must run
107 looking out for all carded and regular trains on time, that is what you have said the rule was?

A. This engine wasn't carded from the round-house.

Q. She had a regular time for leaving the round-house the same as your engine?

A. Yes.

Q. She had the regular opportunity to spend that many minutes going to her train and coupling on?

A. She couldn't take that time and ours.

Q. She had to get out on time if possible?

A. If possible.

Q. Behind you?

A. Yes, sir.

Q. But if she took more than her regular time, she would have then become off time and have to look out for all trains in the yard on the track?

A. She wasn't a carded train from the round-house.

Q. Now, from 48th street, wasn't she?

A. Yes.

Q. Wasn't this west of 48th street?

A. Yes.

Q. So if she was a carded engine west of 48th street, it was your duty to run looking out for her?

A. I suppose so.

Q. To approach at the cross-overs under control?

A. It don't mention this.

Q. Doesn't it say "all cross-overs under control"?

A. No, sir.

Q. "Engines and trains must approach all cross-overs with the utmost caution, expecting to find them occupied," isn't that so?

No answer.

108 Q. "Especially those at the end of different yards." Doesn't it say all cross-overs?

A. Yes, sir.

Q. That means all cross-overs between the main tracks, doesn't it?

A. Yes.

Q. And in particular those that are near the yards?

A. Yes.

Q. Isn't this 48th street—this cross-over west of Robinson's ditch—right ahead of the Wisconsin Central yard?

A. I don't know.

Q. Right at the west end of their yard?

A. I couldn't say.

Q. Can't it be used, and isn't it used frequently to go into their yard?

A. I wouldn't say frequently.

Q. Well, occasionally?

A. It may be.

Q. It can be?

A. Yes.

Q. To go into their yard?

A. Yes.

Q. Then it would be one of the things about which the rule is particular, wouldn't it—one at the end of the yard?

A. I suppose.

Q. Now, at that time, in operating the engine from Robey street to Central avenue for both companies, there was no other engine given the time that you were given, was there, between 8.20 and 8.40?

A. How do you mean by that?

Q. There was no other engine scheduled to take a train requiring it to leave the round-house on the same time you were to leave?

A. No, sir, not for the Great Western.

Q. And there was none for the Wisconsin Central except
109 this No. 27, which was to leave at 8.30 or 8.35, and take its train at 9 o'clock?

A. Yes, sir.

Q. Between those times. You mean no, sir. There was no other but the Wisconsin Central?

A. Yes.

Q. What is meant by the expression, "an engine must approach a place under control"?

A. Well, I suppose stop in case of an emergency.

Q. In case there is anything on the track?

A. Yes, sir.

Q. Does it mean or does it not mean to have it under control so as to be able to stop within the distance at the place specified where an obstruction could ordinarily be seen?

A. Yes.

Q. One of the rules says that?

A. Yes.

Redirect examination.

By Mr. LOVELY:

Q. Mr. Smithson, counsel for the Central Company has asked you several questions——

Mr. GILL: It won't be necessary for me to offer the particular rules which I read to show that they are in evidence?

The COURT: Oh, no, sir.

Mr. LOVELY: The whole list is in evidence, as I understand it.

The COURT: Yes, the entire document.

Q. Mr. Smithson, counsel has in putting questions to you—he said you approach crossings so and so under control. I will ask you what you mean by that, whether you as fireman had
110 anything to do with the management or control of the engine in which you were placed?

A. No, sir.

Q. Did you have anything to do with running that engine?

A. No, sir.

Q. That night or any night?

A. Yes, sir.

Q. As to its speed?

A. No, sir.

Q. As to the care necessary in approaching any place?

A. No, sir.

Q. Who did have?

A. The engineer.

Mr. LOVELY: I think, Mr. Gill, with reference to these rules that are not numbered that there may be some difficulty in discriminating; perhaps we had better take and number these which you called his attention to. You may call it your number, anything that indicates it, so you understand it. You will find no trouble about that.

Mr. GILL: Yes, A, B and C. "All engines and trains in either direction must approach cross-overs." I note one as A, another as B and another as C on Def'ts' Ex. 1. Everything else that has been introduced has been numbered regularly on the time-card.

Q. Mr. Smithson, with reference to the rule numbered A, I will read you the rule. It has been read, the whole of it—part of counsel read you and the latter part was not read the last time. I will read the whole of it, and then I shall base a question on it. "Engines and trains must approach all cross-overs with the utmost caution (especially those at the end of the different yards), expecting to find them occupied. This rule is not intended to relieve trainmen from properly protecting their trains when using cross-overs.
111 Under no circumstances must a train be permitted to stand on a cross-over longer than is absolutely necessary." Counsel has asked you for some explanation of your understanding. Now, does the fireman have anything to do in any way with the approaching of a cross-over?

A. No, sir.

Q. In the control of his train. "This rule," it says, "is not intended to relieve trainmen from properly protecting their trains when using cross-overs." Who is meant by "trainmen"? Is the fireman one of the trainmen?

A. Yes, sir. No; he is not one of the trainmen.

Q. The word "trainmen" in railroad parlance means what?

A. The conductor and brakemen, I think.

Q. That is what I want to know.

Mr. GILL: We will see about that. I differ with you, that the fireman is one of the trainmen.

Q. Under whose direction and control is the fireman when he is on the engine?

A. Under the engineer's.

Q. Has he any right whatever to leave his engine or give any direction of any movement?

A. Not without permission from the engineer.

Q. You say you were a switchman. About how many trains passed over those tracks in each direction daily? If you don't know, you needn't answer.

A. I don't know.

Mr. GILL: The time-card will show, won't it?

WITNESS: No.

Q. Now counsel has used the word "carded." You understand by that the time carded on the time-card. Now, were either of these engines that were in the usual habit of coming out from Robey Street round-house out to Central avenue to take their trains—were either of those engines indicated on the time-table from those two points?

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A. From Central avenue to Robey street?

Q. Yes.

A. Yes, sir. The Wisconsin Central was—is carded from 48th street.

Q. 48th street isn't at Robey Street round-house, is it?

A. No, sir; it is at the east end of the yards.

Q. Your train—they went out regularly, didn't they, every night in this same way?

A. Yes, sir; generally.

Q. Now, counsel has asked you with reference to your knowledge of the train. About what time would you get to Robey Street round-house, ordinarily, when you went there to take your engine out to go with it to Central avenue?

A. Oh, about 8 o'clock.

Q. About 8 o'clock?

A. Yes, sir.

Q. So that was considerably before the leaving time of the Central?

A. Yes, sir.

Q. You usually left first. What was the reason you didn't leave first, if you knew, that time?

A. We had to wait for a brakeman.

Q. Do you know whether the engineer or any person on the other train (on the Central engine)—do you know whether they had any knowledge of the fact that you were to come behind them?

A. Yes, sir.

Q. Knew that you would follow immediately after?

A. Yes, sir.

113 The answer was stricken out by consent.

Q. You say you remember of seeing one red light, you stated to Mr. Gill? I understood you to say that there should be two.

Objected to.

Q. Well, at what time was it you saw this one red light?

A. When we were standing on the track there, when he went by me, pulled out, pulled out alongside of me I saw it.

Q. Now, when you stop your engine at a railroad crossing—counsel asked you, you didn't mean that you stopped it?

A. No, sir.

Q. When it was stopped at a railroad crossing, how long did it stop there?

A. Just come to a standstill.

Q. What then?

A. Proceeded.

Q. Now, were there any instructions or rules given to you or published as to your conduct or the conduct of your employés in taking engines out of your round-house to go to Central avenue, by your company?

A. I don't understand that.

Q. You have testified these were the rules of the Chicago & Northern Pacific. Now, except these rules that have been introduced here, did your company that you were working for give you any rules as to the time when you should leave your round-house and as to the conduct of your engine, the management of it from that time until it reached the limits, reached Forest Home?

Objected to as irrelevant, incompetent, and immaterial, because it appears conclusively that these engines and trains were under
114 the exclusive control of the Chicago & Northern Pacific until they reached Forest Home.

The COURT: Overruled. It is proper to show whether they were or were not their rules.

Exception by defendants.

A. No.

Q. Besides these rules I say?

A. No.

Q. With reference to the registration, did you have anything to do with registering engines in or out?

A. No, sir.

Q. Was there any regular time for leaving, schedule time proclaimed or announced as a rule by your company as to the time when you should leave?

A. Leave where?
Q. Leave Robey Street round-house.
A. There was no schedule time; no, sir.
Q. What do you mean by saying you were due to leave there at a certain time?
A. Well, we are called to go out at that time.
Q. What do you mean by that? How were you called?
A. Well, they generally call the crew an hour before leaving time at Robey street, and if you are there and all ready, you leave at that time; if you are not, you leave at some other time. They have got to have some rule to have the men on time.
Q. With this subject of leaving and when you left or anything of that kind, you had nothing whatever to do?
A. No, sir.
Q. And there was no instruction or rule made with refer-
115 ence to that subject that was ever called to your attention by your own company?
A. No, sir.

Recross-examination.

By Mr. GILL:

Q. You sometimes ran that engine, didn't you?
A. When I was instructed by the engineer, yes, sir.
Q. And did that night, didn't you.
A. I moved it, yes, sir.
Q. Before the Wisconsin Central passed you?
A. Yes.
Q. In answer to cousel you have said that at a railway crossing your engine simply came to a stop and passed on; that wasn't always true, was it?
A. It was if there was no obstruction there.
Q. You couldn't pass the railroad crossings there until you got a signal from the towerman, could you?
A. Not at Twelfth street; no, sir.
Q. The same at the Belt, too?
A. 48th street, yes, I think so.
Q. There is a signal there?
A. Yes.
Q. And if the other track was being used, then you would have to wait until it was clear?
A. Yes.
Q. There was sometimes you had to wait there some little time?
A. Yes.
Q. The whole crew was the train crew, wasn't it?
A. Yes.
Q. You are a trainman the same as the others, are you not?
A. As fireman, I suppose.
Q. You have to do flagging sometimes, don't you?
A. If I am ordered to.

116 Q. Under the rules you have to do it sometimes?
A. Yes.

By Mr. LOVELY:

Q. With reference to being ordered to do it, who orders you to do it?
A. The engineer.
Q. Would you have any right, under your proceedure and line of duty, to do any flagging without any directions from the engineer?
A. No, sir.
Q. Now, counsel asked you with reference to your moving the engine that night. The question I would like to know, when was it that you moved the engine?

Mr. GILL: He stated that in direct examination.

Q. Was it before you got onto the main track or after?
A. It was before.
Q. Who brought the engine out from the round-house there?
A. The hostler of the round-house.
Q. What was his name?
A. I don't know who was hostling that night. You mean the Great Western engine?
Q. Yes, the Great Western, your company engine.
A. I couldn't say who it was.

MARTIN LARSEN, sworn as a witness in behalf of plaintiff, testified:

Examined by Mr. LOVELY:

Q. Mr. Larsen, your full name is——
A. Martin Larsen.
Q. What is your age?
A. Thirty-three.
117 Q. What is your occupation?
A. Engineer.
Q. How long have you been engaged in that occupation?
A. Up to this time, up to now?
Q. Yes, sir.
A. About seven and a half years.
Q. You are a locomotive engineer, I believe?
A. Yes, sir.
Q. Are you in the employ of either of these defendants?
A. On the Chicago, Great Western.
Q. You were an employé of the Chicago, Great Western at the time of this collision?
A. Yes, sir.
Q. At Robinson's ditch?
A. Yes, sir.
Q. You may state whether you were in charge of the engine of the Great Western.
A. Yes, sir.
Q. I would like to have you go on and tell what occurred there.

A. At Robinson's ditch?

Q. From the time you left Robey Street round-house until the collision, just go on and tell what occurred, that is all.

A. We was to leave Robey Street round-house at 8.20. We didn't leave at 8.20 on account of one of the brakemen not being there. The Wisconsin Central engine, it was standing on the same track we were, behind us. At 8.30 the Wisconsin Central man (who it was I don't remember) come up and says, "Let us out."

Mr. GILL: If the court please, let the witness be instructed not to relate conversations.

The court cautioned the witness.

Mr. LOVELY: We want to show that they had knowledge.

Q. Go on and state what you did.

118 The COURT: I think it is proper to show that the request was made in pursuance of which the engine's position was shifted, so as to show that it was not the wilful act of this witness of whose acts the plaintiff must take notice, being in close association with him.

Mr. GILL: It has no reference to the accident. It was in reference to the time they were about to leave the round-house.

The COURT: I think the objection will be overruled.

Exception by defendants.

The COURT: State what was said and what you did there.

A. This person says for us—wanted us to get out of the way so they could proceed. So I was standing at the switchman's shanty about a couple of car-lengths——

Q. This was somebody from the Wisconsin Central engine?

A. Yes; a couple of car-lengths from our engine; and the fireman, I think, was on the ground, I am not positive.

Q. Which fireman?

A. My fireman, Smithson.

Q. The plaintiff in this case?

A. Yes, sir. I says to Fireman Smithson, "Get up there and move that engine out of the way;" and I threw the switch myself to let our engine on the other track so the Wisconsin Central engine could proceed. We staid there then ten or fifteen minutes longer, and in the meantime the coaler came to me and said that——

119 Q. Never mind what he said. The coaler came.

A. I am trying to——

Q. I know, but I don't think it is perhaps proper.

A. We would pick up the brakeman at Twelfth street.

Q. You went on?

A. Yes, we went on about 8.40 or 8.45. We slowed up a little at Western Avenue cross-overs. We stopped at Twelfth street or very near stopped, for Brakeman Long. The track was clear there and afterwards.

Q. What do you mean by the track being clear?

A. Semaphore at Twelfth Street crossing, where there is a curve around from Twelfth street to California avenue, and the curve is

on the left-hand side, so we didn't go very fast around there. We have a clear track then until we get to 40th street. We slowed up there a little bit. At 40th Street crossing there is a cross-over where the other road runs in an opposite direction. The next stop then was Belt crossing. We stopped there for the semaphore and we got to the semaphore and proceeded to 48th street. At 48th street the curve was on the right-hand side and everything looked clear. We proceeded on until we got almost in or near Robinson's ditch before I saw the engine of the Wisconsin Central. As soon as we saw the engine, why we stopped.

Q. How near to the engine did you approach before you saw it?

A. I couldn't tell you the distance. The best knowledge, maybe two or three car-lengths or four car-lengths; I couldn't say.

120 Q. How did you observe it?

A. By my headlight reflecting on their tank.

Q. Your headlight was lighted?

A. Yes, sir.

Q. Did you see any lights or signals or anything at all to indicate danger before you reached the point where your headlight was thrown upon the tender of the Wisconsin Central engine?

A. No, sir.

Q. What were you doing all that time with reference to observation of the track ahead of you?

A. Looking ahead.

Q. On which side of the engine were you?

A. Right side.

Q. Which side is the side for you to be?

A. Right side.

Q. Was there anything peculiar to attract your attention out of the ordinary course until you discovered the flash of the headlight upon the tender of the Wisconsin Central locomotive?

A. No, sir.

Q. Did anybody make a noise on your engine about that time?

A. No, sir, not that I remember of.

Q. No hollering or anything?

A. Not that I remember of.

Q. Was there considerable noise around your engine?

A. Yes, sir.

Q. What did you do when you discovered the tender of the Wisconsin Central?

A. I took hold of the whistle and gave one blast of the whistle, reversed the engine and applied the air.

Q. What occurred there?

A. We struck.

121 Q. How hard did you strike?

A. The force of the blow, you mean?

Q. Yes.

A. Well, it is pretty hard to say the force of the blow because I couldn't tell. I can't say that I even felt it in the engine.

Q. Did it break anything?

A. Yes, sir.

Q. What did it break?
A. On my engine?
Q. Yes.
A. Broke the pilot, pilot beam, knocked the headlight off and broke the air pipe. The air pipe projects from the pilot, so if you are backing up and requiring air, you can couple it.
Q. Did your engine push the Wisconsin Central ahead?
A. I couldn't say.
Q. How soon after you applied the air do you think your engine came to a stop?
A. The distance or the time?
Q. Well, both.
A. Well, say in half a minute and in about eight car-lengths, or six or eight car-lengths, along there.
Q. How far ahead of an engine, in the night-time, will a properly illuminated headlight disclose objects?
A. A clear night?
Q. Such a night as this.
A. As it was that night?
Q. Yes, sir.
—. With no obstruction, you mean?
Q. Yes, sir.
A. Well, two or three telegraph poles.
Q. Telegraph poles are 100 feet apart?
A. Sixty, I believe.

Mr. GILL: Telegraph poles sixty feet apart?
WITNESS: Or, 160, which is it?
122 Mr. GILL: How many in a mile; then figure on it.
A. I don't remember.
Q. What did you discover about Smithson's injury at that time?
A. What did I discover about Smithson's injury?
Q. Yes.
A. Well, I didn't see Smithson at the time—just at that time, until—I didn't see Smithson until that night, along towards morning; that is, knew what his injuries was.
Q. What did you do with your engine right after the accident?
A. Took it back to Robey street.
Q. Did you go out that night?
A. No, sir.
Q. You were able to run your engine back there, were you?
A. Yes, sir.
Q. Do you know what the usual speed is that you were allowed to run along between Robey street and Central avenue?
A. Yes, sir.
Q. What was it?
A. Twenty-five miles an hour from Chicago to Western avenue; twenty miles an hour and twenty-five miles an hour from Western to 40th; and thirty-five miles an hour from 40th to 48th street; from 48th street west, it doesn't give any speed.
Q. You say you were "allowed to run"—what do you mean?

A. The ordinance of the city of Chicago.

Q. Was that the usual and customary time which you observed in running your train?

A. Use your judgment.

123 Q. Not to exceed that time?

A. Not to exceed that time.

Q. Were you running at that point along there any faster than usual on that night?

Objected to and question withdrawn.

Q. I will ask you what your rate of speed was along there?

A. Oh, between fifteen and twenty miles an hour.

Q. Did you have your engine under control?

A. You can't have your engine what you may say under control when you are running twenty miles an hour.

Q. I mean with reference to the rate of speed that you were allowed to use?

A. Oh, yes, sir. You mean the limit of speed?

Q. Yes.

Mr. GILL: You mean by that it was under the limit, is that what you say?

A. Yes.

Q. Does the fireman have anything to do with the control of the engine or the management of it or the operation of it?

A. No; he has his duties to perform.

Q. Please tell us what those duties are when the engine is in motion.

A. Replenish the fire and break up the coal, ring the bell, sweep off the deck, see the oil cans are filled, look ahead. Watch signals on his side.

Q. All these duties are done under the control of the engineer, are they not?

A. Yes, sir.

Q. Subject to his orders?

124 Mr. GILL: I move to have that stricken out—must tell him when to sweep the deck or put in the fire.

The COURT: Stricken out.

Q. You have stated what the fireman's duties are. Now under whose direction are these duties, and are these duties performed by the fireman?

A. Well, they are performed under the engineer, and also the engineer gives his instruction; they are in his department.

Cross-examination.

By Mr. LAWLER:

Q. Mr. Larson, it is about half a mile from the curve at 48th street down to Robinson's ditch west, is it not?

A. Yes, sir.

Q. There is a clear track, the view is unobstructed over that one-half mile that I have mentioned?
A. Yes, sir.
Q. You were on the right-hand side of the engine?
A. Yes, sir.
Q. For the engineer's side. And with reference to an engine standing down at Robinson's ditch, you would have the advantage of the curve there, would you not?
A. Yes, sir.
Q. I believe you have testified that the first notice you had of the presence of the Wisconsin Central engine on the track ahead of you at Robinson's ditch was when your headlight shone on the rear of the Wisconsin Central engine?
A. Yes, sir.
Q. Did you notice any light at the rear of the Wisconsin
125 Central engine at that time or at any other time that night?
A. No, sir. Didn't notice any light at all.
Q. You have seen this set of rules, Mr. Larsen, have you not?
A. Yes, sir.
Q. Of the Chicago & Northern Pacific Railroad Company?
A. Yes, sir.
Q. (Def'ts' Ex. 1 shown witness.) State whether those rules were the rules under which you ran over the Chicago & Northern Pacific tracks?
A. Yes, sir.
Q. From whom did you get those rules, Mr. Larsen?
A. My locomotive foreman. You mean the time-card?
Q. Yes, from whom did you get the time-card?
A. From the locomotive foreman.
Q. And by the time-card you mean that document that you have there embracing the rules and regulations, do you not?
A. Yes, sir.
Q. By your locomotive foreman you mean the locomotive foreman of the Chicago, Great Western Railway Company?
A. Yes, sir.
Q. They were for your guidance and instruction in operating your engine over the tracks of the Chicago & Northern Pacific there at Chicago?
A. Yes, sir.

Cross-examination.

By Mr. GILL:

Q. Were those the rules governing all the engines operating over those tracks?
A. No.
Q. What other rules were there?
126 A. The switch-engines didn't have any rules in the time-card.
Q. They have to obey those rules?
A. Certainly.

Q. The rules are the rules governing all engines operating on those tracks?

A. Yes.

Q. Including the Chicago, Great Western?

A. Yes.

Q. Chicago & Northern Pacific, Baltimore & Ohio and Wisconsin Central. You have testified, Mr. Larsen, that you didn't see any red light upon the Wisconsin Central tender just before the collision?

A. Yes, sir.

Q. Have not you stated otherwise?

A. Not that I remember of.

Q. Don't you remember right at that time, while you were there, before you passed away from that point of collision, with your engine backed up 48th street, that you stated that you did see the red light, that you had passed the Wisconsin Central passenger train coming in on the other track, and the smoke had cleared away?

A. No, sir; not that red light.

Q. A red light?

A. Not a red light on that track.

Q. What red light did you refer to then?

A. Over in the yard.

Q. Didn't you say that you saw this red light on the tank which you thought was a switch-light?

A. No, sir.

Q. Didn't you say to the Wisconsin Central engineer the
127 next day at the time of the investigation, or at the time of the investigation shortly afterwards, that you saw the red light but thought it was a switch-light on the cross-over?

A. I did not talk to the Wisconsin Central engineer at all.

Q. You never said that you passed the Wisconsin Central train coming in on the other track and the smoke from that train had cleared away and you saw a red light ahead of you which you thought was a switch-light?

A. Never said it at all.

Q. And you swear to that?

A. Yes, sir.

Q. Do you know whether there was a red light there or not?

A. No, sir, I don't know.

Q. You didn't look to see, did you, at that time?

A. At the time that we were coming or struck?

Q. At the time of the collision, just before?

A. I looked ahead, yes.

Q. You looked ahead but you think you don't remember seeing one—is the only thing you will testify to, is it not? You don't testify that there wasn't one there?

A. No, sir.

Q. Now, when you say that the fireman's duties are exercised under the control and supervision of the engineer, or under the control of the engineer—you mean to have the jury understand that the engineer has to tell the fireman every time he puts in coal, or every time he rings the bell, sweeps off the deck, takes a lookout?

A. If he has a mind to, yes, sir.

128 Q. Do you do that with a man that was in the service two years?

A. No, sir.

Q. Would you do it with this man?

A. No, sir.

Q. A man that is competent upon a road of this kind, isn't he required by the rules to do that?

A. Yes.

Q. Doesn't his general experience require him to do those things alone and without any direction?

A. Yes.

By Mr. LOVELY:

Q. Mr. Larsen, those are the general duties that the fireman has to do and the engineer never does it, are they not, putting in fire and those things that the fireman does, but still he is under the control of the engineer. Can he leave his place or go and give a signal or do any signaling behind or anywhere else without the instruction from the engineer?

A. Could he give a signal?

Q. No. Would he be authorized to get out himself and go and do any signalling without direction from the engineer?

Mr. GILL: He takes signals from the others.

Q. You made the statement, that is all. I just wanted to know from him that he doesn't do any signalling unless he is directed.

A. That is right.

Q. Did you see anybody about the time of the accident, the fireman or the engineer of the Wisconsin Central engine near there at all?

A. At the time of the accident?

Q. Yes, or just after.

129 A. Yes; I saw the fireman over in the yard, opposite. I won't say whether he was right opposite or kind of catacorner from his engine, maybe two tracks from his engine—two or three tracks; in that neighborhood.

Q. How soon after the accident?

A. Well, very soon after the accident. Just the length of time, I couldn't say.

Q. Where was he coming from?

A. I couldn't say where he was coming from.

Q. Where was the engineer at that time of the Wisconsin Central?

A. I couldn't say.

Examined by Mr. GILL:

Q. Where were you when you saw the fireman?

A. Standing on the ground.

Q. Which side of your own engine?

A. Left side.

Q. Was that after you had gotten out of your engine?
A. Yes.
Q. After the collision?
A. Yes.
Q. How did you know it was the fireman?
A. Just by his appearance.
Q. Did you know him personally?
A. No; not personally.
Q. Could you see his face from where you stood?
A. Well, I don't remember.
Q. Weren't there a number of people around there at that time?
A. No.
Q. Wasn't your crew around there?
A. They were scattered around.
Q. Weren't they close to the engine at that time?
A. Not at that time; no.
130 Q. Had they carried Smithson over to the caboose in the yard?
A. I couldn't say.
Q. Do you know whether the other fireman help- carry Smithson over after he had been requested to? Do you know whether he had been in with Smithson at that time and returned?
A. I didn't see him.
Q. You don't know whether—you couldn't see his face that distance?
A. I couldn't see his face that distance.
Q. Was it somebody told you there?
A. No, sir; I surmised it.
Q. How many people were there around there that night at that time?
A. In that vicinity?
Q. Yes; right there in the vicinity.
A. There was three; Smithson and I is five. The fireman, I guess—all I could see on the ground.
Q. Wasn't there also the car-repairer there?
A. I didn't see any of them.
Q. Didn't you speak to him afterwards?
A. The car-repairer?
Q. Yes.
A. I couldn't say I did.
Q. Did you see him there with a light at that time with another man?
A. I couldn't say.
Q. Was the brakeman of the caboose there at that time, too?
A. No; not at that time; he came afterwards.
Q. Had they picked up Smithson before that?
A. I don't remember.
Q. When did you know Mr. Smithson was hurt?
A. When the brakeman came and told me.
131 Q. That was a ter the brakeman and Mr. Long had picked him up behind your engine?

A. Before, I think.
Q. That is the first you knew of it?

By the COURT:

Q. I wish to ask you a question: Suppose in the opinion of the engineer it becomes necessary for the fireman to put coal into the furnace of the engine, or perform any other duty which he is not at that moment performing, under the digest of rules of your company at that time, who was to determine what the fireman should do? Would the fireman keep on ringing the bell and decline to put in coal at the direction of the engineer, or must he stop ringing the bell, for instance?
A. Do it as he sees fit.
Q. Whose judgment must prevail in that case?
A. His own judgment.

By Mr. LOVELY:

Q. Suppose any task must be done about the engine in the opinion of the engineer, would the engineer have the right to control him, control the fireman, tell him what to do?
A. Yes, sir.
Q. But still in regard to firing the engine the fireman could do as he pleased irrespective of the engineer's wishes?
A. Yes, sir, unless the fireman was putting in coal there where the engineer thought it wasn't needed, and he could tell him to leave it burn awhile, wait until it burns up a little more and put in some more.

Q. Could the fireman under the rules and digest of the rule-
132 as they prevailed at that time disregard the engineer's instructions?
A. No, sir.
Q. He must obey them?
A. Yes, sir.
Q. Who dictates the amount of steam that should be kept up on the engine?
A. The engineer.

The jury were cautioned and a recess was taken until 2 o'clock p. m., at which time court convened.

RICHARD LONG, sworn as a witness in behalf of plaintiff, testified:

Examined by Mr. LOVELY:

Q. Mr. Long, where do you reside?
A. Chicago.
Q. What is your occupation?
A. Freight brakeman.
Q. For what company?
A. Chicago, Milwaukee & St. Paul.
Q. How long have you been in the employ as a brakeman of the Milwaukee road?

A. I commenced there in August—September 26, 1895.
Q. Previous to that time by what company were you employed?
A. I was employed by the Chicago, Great Western; from June 30, 1893, to about June 30, 1894.
Q. June 30, 1893, is that the date?
A. June 30, 1893, yes, sir.
Q. Till what time?
A. About June 30, 1894; I ain't sure.
Q. About a year?
A. Just about a year.
133 Q. You were in their employ at the time of this injury?
A. Yes, sir.
Q. Were you a brakeman?
A. Yes, sir.
Q. On this run?
A. Yes, sir.
Q. You were with the rest of your crew at Robey Street roundhouse on the night of the 7th?
A. No, sir; I was not.
Q. Where was you?
A. I got on at Twelfth street.
Q. Before the injury?
A. Yes, sir.
Q. At the time of the injury where were you, Mr. Long?
A. I was standing in the south gangway of the engine.
Q. The south gangway of the engine. The fireman was——
A. Fireman's side, yes, sir.
Q. You may state who was on the engine at that time and place.
A. At the time we left Twelfth street?
Q. Well, yes; from that time until shortly after the collision occurred.
A. Mr. Smithson, Mr. Long, the conductor, Mr. Larsen, and Mr. Frazier, the other brakeman.
Q. Were you making any observations of the track ahead of you during that time?
A. Yes, sir; I was.
Q. You were standing in the gangway, and did you continue standing there until the time of the collision?
A. No; not up until the time of the collision I didn't.
Q. Go on and tell just what occurred, Mr. Long. You are able to do that. Let us know.
134 A. I stood in the gangway all the way from—well, about 40th Street junction, what they called, and stood in the gangway and was running at that time and looking ahead all the way and continued to stand there until I saw the headlight shine on the hind end of the tank.
Q. Of what?
A. Of the engine.
Q. About what locality was that on the road?
A. Well, I should judge it was about—as near as I can remember it is about half way between 48th street and Central avenue.

Q. Do you know a place, locality there called Robinson's ditch?
A. I don't remember the place exactly, no.
Q. Are you able to locate the place where the collision occurred?
A. Well, not exactly but very near.
Q. How near was your engine to the engine on the track ahead of you when the headlight of your engine first shone onto it?
A. About three car-lengths or three and a half car-lengths, something like that.
Q. You are a brakeman, you know the length of a freight car?
A. Some cars differ.
Q. State on an average about?
A. A freight car is considered about thirty-five foot.
Q. That is what you mean when you say about three car-lengths——
A. Yes, sir.
Q. —over 100 feet. What was said or done by any person on your engine at that time?
A. Well, all I remember about it is hearing the engine whistle once, one blast of the whistle, and I got off.
135 Q. Well, sir, you say that you were looking ahead down the track?
A. Yes, sir.
Q. All the while until—did you see any signal of a red light or any kind of a signal or warning before your headlight shone upon the engine?
A. I did not.
Q. Could you have seen if it had been there?
A. Yes, sir.

Objected to as calling for a conclusion. Objection overruled. Exception by defendants.

A. I should think I would have saw it if it had been there.
Q. Your eyesight is good?
A. Yes, sir, I think it is.
Q. What was the force of the collision, did you remain on the engine until the train struck, or did you——
A. No, sir.
Q. What did you do?
A. I jumped off.
Q. Tell us what occurred after that. Go right along and tell the jury what occurred.
A. Well, I jumped off. I lit on my feet, and I was thrown on the inbound track, clear over on the inbound track.
Q. Will you place that a little more—the incoming track? The inbound track was south of you?
A. Yes, sir.
Q. The right-hand track would be the track always which the engines were going out, trains were going out?
A. Yes, from Chicago.
Q. Out of Chicago, and turned around, it would be the left-hand side coming in?

A. Yes, sir.

136 Q. How far did the train go by you, did the engine go by you before it struck the tender of the Wisconsin Central?

A. Well, I should judge it was about three car-lengths, three and a half car-lengths, something like that.

Q. Did you notice whether your engine struck the Wisconsin Central engine with considerable force, were you able to tell?

A. No, I wasn't able to tell exactly how hard they did strike.

Q. Make any noise when they came together?

A. Yes, they made a little noise.

Q. What did the engineer of your engine do, if you know?

A. I don't know exactly what he did do.

Q. Did I understand you to say that your engine passed you about three car-lengths before it stopped?

A. Yes, sir.

Q. Did you see Smithson after that?

A. I did, yes, sir.

Q. Tell us about that.

A. I got up and walked around and walked back a little ways, and I could see an object lying on the track, and I thought it was the other brakeman. And all at once I heard him say that—do you mean for me to tell you what he said?

Q. No, I don't care about that.

A. He says, "Somebody come here quick, the fireman's leg is off." That is about all I remember at that time.

Mr. GILL: Who was that that said that? Smithson, was that?

WITNESS: No, the other brakeman said it.

137 Mr. LOVELY: I asked him where Smithson was, I didn't ask him what he said.

Q. What was done with Smithson? Did you help take care of him? Did you help pick him up?

A. I did not, no, sir.

Q. Where did you go?

A. I went to the Wisconsin Central caboose then.

Q. What was there in the Wisconsin Central caboose, was there anybody there?

A. There was two or three men, if I remember right.

Q. Do you know their names?

A. I do not, no, sir.

Q. Do you know whether either the engineer or the fireman of the Wisconsin Central engine was in the caboose?

A. I wouldn't say for sure, no, sir.

Q. Anything else in the caboose that you noticed?

A. Yes.

Q. Eh?

A. There was a dog in there.

Q. A dog?

A. Yes, sir.

Q. What kind of a dog?

A. Well, it was a very large dog; I don't know what breed he was. I know he was a very large dog, kind of a grayish color.

Q. Well, you say very large, was he one of these mastiffs?

A. He was—would be considered a large dog.

Q. Had you seen the dog previous to that time? Had you seen him?

A. Not until I got to the east end of the caboose.

Q. Was he chained there or——

A. He was chained there, yes, sir.

138 Q. How soon after your engine struck the Wisconsin Central did you get over to the caboose?

A. Well, I should judge it was about five minutes.

Q. This dog that was chained what was he chained to?

A. He was chained back in the back of the cupola; I didn't notice exactly what he was chained to. I know that he made a lunge at me but didn't quite get me.

Q. You were familiar with the manner in which these trains, these engines, went out of the round-house to go over to Central avenue, were you?

A. I was familiar with the way they done, yes, sir.

Q. What engines were usually kept in the Robey Street round-house?

A. Well, there was the Northern Pacific, Chicago & Northern Pacific engines, the Wisconsin Central engines and the Chicago, Great We-tern engines that I know of. Those three different roads or lines that you call them.

Q. Any others?

A. Not that I know of, no, sir.

Q. Do you know about the usual custom this engine of yours going out to go upon its voyage from Central avenue to Dubuque?

A. Yes, sir.

Q. Well, what was the time which it generally left the Robey Street round-house?

A. Well, the time it was set was about—was 8.20 leave Robey street.

Q. Do you know what time the Wisconsin Central engine went out to go to Central avenue generally?

A. Generally as I understand it at 8.30.

139 Mr. GILL: Do you know of your own knowledge?

WITNESS: Yes, I know.

Q. If you know you may state, Mr. Long.

A. Well, we——

Q. About the Wisconsin Central, about what time it usually left the round-house?

A. About 8.30.

Q. You wasn't at the round-house that evening but got — at Twelfth street; how far was that from the round-house?

A. Oh, I should judge it was about a mile, maybe a little more than that.

Cross-examination.

By Mr. LAWLER:

Q. Mr. Long, about how far away were you from the Wisconsin Central engine when you first noticed it?

A. About three car-lengths or three and a half car-lengths.

Q. How many feet is that, about 200 feet?

A. It is considered about thirty-five foot to a car.

Q. Thirty-five foot, that would be about 110 or 115 feet? State whether according to your best recollection the Wisconsin Central engine was moving or was in rest at that time.

A. I couldn't say for sure whether it was moving, but don't think it was.

Q. You don't think it was?

A. No, sir.

Q. Why don't you? Was there anything about it that indicated that it wasn't moving?

A. There wasn't any sparks coming out of the stack, or
140 anything like that that I could notice indicating that the engine was moving.

Q. With reference to the time that you jumped when was it that you noticed it there and you noticed there were no sparks?

A. Well, when the headlight shone on the hind end of the tender was the first I noticed it.

Q. Was that about the time that you jumped from the engine?

A. Well, yes, just about.

Q. Did you notice it start up; did you notice sparks come afterwards?

A. I didn't notice it.

Cross-examination.

By Mr. GILL:

Q. You don't mean to swear that it was standing still of your own knowledge?

A. No, I didn't say that it was.

Q. All you saw of that engine was just a flash and then you jumped?

A. Saw the headlight flash on it, and jumped off.

Q. What part did the headlight strike that you remember?

A. The tender, the hind end.

Q. Did the light cover the whole hind end of the tender?

A. I don't know.

Q. Or just the whole——

A. Covered the whole hind end of it.

Q. You were standing in the gangway looking out and looking ahead?

A. Yes.

Q. And saw the headlight flash on the tender of that engine, and you immediately jumped?

A. Yes.

Q. That is all you saw?

A. Yes, sir.

141 Q. You didn't look at the stack to see if there was any sparks coming?

A. No, sir.

Q. You didn't see any before?

A. No, sir.

Q. If the engine was driving along, running three or four miles an hour, would any sparks be coming out?

A. I don't know.

Q. Don't you know from your experience that an engine running on a level track, on such a track five to ten miles an hour wouldn't throw any sparks?

A. It depends on how an engineer runs an engine.

Q. It wouldn't work hard to do that with a light engine, would it, running on a level track, five or ten miles on a level track?

A. Some engineers don't work them very hard, no, sir.

Q. If an engine were run five to ten miles an hour on that level track, would it?

A. As I said before, it all depends.

Q. I am giving you the conditions, a level track, light engine, running five to ten miles an hour; would any sparks necessarily come from the stack?

A. I wouldn't say they wouldn't.

Q. Isn't it a fact that if the engine is working hard the sparks come?

A. To some degree, yes.

Q. There are no sparks coming out of an engine when she is working lightly?

A. There might be.

Q. Do you know how an engine is equipped?

A. I don't say that I am an engineer, no, sir.

Q. Do you know whether they have a screen to prevent the escape of sparks?

A. I don't know anything only what I heard.

142 Q. You don't know how they are constructed, with spark-ar-esters?

A. No, sir, I am not an engineer.

Q. You don't mean to swear the engine was standing still?

A. No, sir, I wouldn't swear it was standing.

Q. You saw a flash and jumped off?

A. Yes, sir.

Q. Now, locate as near as you can, Mr. Long, where this collision took place?

A. I should judge it was about half-way between 48th street and Central avenue.

Q. Why do you judge that?

A. Why, because I know the lay of the road there.

Q. Yet you don't remember Robinson's ditch, do you?

A. No, sir.

Q. But you remember a cross-over in there, anyway?

A. Yes, sir.
Q. Where is that?
A. That is about half way.
Q. It was close to that cross-over, was it?
A. Yes, sir.
Q. A little east of the cross-over?
A. To my judgment, no.
Q. Which way?
A. A little west.
Q. Did you go there and examine it?
A. I didn't go there and examine it, no, sir.
Q. Did you look that night with reference to the cross-over?
A. I know where I picked myself up at that time, right near the cross-over.

Q. Which way was it, west?

143 A. It was just about opposite with the west switch on the west-bound track.

Q. The west switch on the west-bound track?
A. Yes.
Q. That is, the west switch on the north track?
A. Yes, sir.
Q. You don't know what effect it had upon moving the Wisconsin Central engine after the collision?
A. No, sir.
Q. Don't know whether it moved it at all?
A. No.
Q. Do you know where the Wisconsin Central engine was standing after the collision with reference to this cross-over switch?
A. I don't exactly; no, sir.
Q. Do you remember about how far?
A. Well, no, I couldn't say.
Q. Do you remember making a statement once in regard to this matter and saying that after the collision the Wisconsin Central engine stood about three car-lengths west of the cross-over switch?
A. I probably might have.
Q. If you did say so, was it true?
A. If I made that statement, yes.
Q. Do you know whether you did or not? Do you remember making it in McDonald's office or somewhere in the city?
A. I do, yes, sir.
Q. You remember making that? Look at the signature which is attached to this paper and see if that is your signature?

A. That is my signature.

144 Q. Look at the statement on page 11, near the bottom of page 11, and tell me whether or not it says this, question and answer: "Where did the W. C. engine stand, east or west of the cross-over? A. West of the cross-over switch. Q. How far west? A. I should judge about three car-lengths."
A. Well, I said that I didn't remember.
Q. Did you make that statement in there?
A. I made that statement.

Q. That was a fact, then, was it not?
A. Yes.
Q. That is, after refreshing your recollection from this paper?
A. Yes.
Q. You went up and looked at it at that time? You stated that you went up and looked at the W. C. engine at that time?
A. No, sir, I don't think I did.
Q. Didn't you make that statement in there at the time?
A. To my knowledge, I don't think so.
Q. Refreshing your recollection again: "Did you go up and examine where the engine stood after the accident? A. I went up to look at the W. C." just above that I have spoken to you about.
A. I don't recollect that.

GEORGE PACKER, sworn as a witness in behalf of plaintiff, testified:

Examined by Mr. LOVELY:

Q. Mr. Packer, where do you reside?
A. Chicago.
Q. What is your occupation?
A. Railroad man.
145 Q. And in what capacity?
A. Night yard switchman of the Baltimore & Ohio railroad.
Q. Do you remember the collision that occurred on the evening of March 7, 1894, near the place called Robinson's ditch, in Chicago?
A. Yes, sir.
Q. Where were you at that time?
A. I was about ten car-lengths west of where the accident happened.
Q. Where you could see it?
A. I couldn't see the—I didn't see the collision at the time. The cars was passing between me and the engine at the time the collision happened.
Q. Had you seen the Wisconsin Central engine before that?
A. I had seen an engine come up there; yes, sir.
Q. What did it do there?
A. Stopped there just west of Robinson's ditch or the cross-over.
Q. How long did it stop there?
A. I should judge three or four minutes, maybe a little longer; whistled two or three times.
Q. While it stopped there?
A. When it first stopped.
Q. Did you go up to the engine after the collision?
A. I did, sir.
Q. How?
A. I did; yes, sir.
Q. Was it this Wisconsin Central engine?

A. This Wisconsin Central engine had been struck by C. G. W. engine.

Q. In whose employ were you at that time?

A. I forget whether I was on the pay-roll of the Chicago & Northern Pacific or Wisconsin Central, I couldn't say which. I
146 was making up Wisconsin Central trains. I don't remember which road I was getting pay from.

Q. You were a switchman?

A. Yes, sir.

Q. Yard switchman?

A. Yes, sir.

Q. Do you know where the caboose of the Wisconsin Central train was?

A. Yes, sir. It was west of Robinson's ditch on track No. 1.

Q. Do you know whether that Wisconsin Central engine was moved any by the collision from where it first stopped?

A. It looked to be moved, by coal scattered on the track, I should judge a couple of car-lengths.

Q. Did you notice whether there were any breakages about the Great Western engine?

A. Yes, sir. I noticed the pilot was broken and headlight, I believe, was knocked off.

Q. Did you see the engineer, Larsen?

A. I did. I saw him shortly after I got down to the engine.

Q. Did you go over to the caboose?

A. Yes, sir.

Q. How soon after the collision did you go over to the Wisconsin Central caboose?

A. I ran down there as soon as I heard the crash, to the engines; went by the engine and I saw this brakeman or this fireman laying on the ground there, and I ran over towards the caboose to get a piece of rope to tie up his legs with, and I met, I believe, a W. C. fireman.

Q. You met who, a W. C.—Wisconsin Central fireman?

147 A. Yes, sir. I met the W. C. fireman, and also a W. C. brakeman had come back there at this time. I believe he got a rope to tie up his leg, the brakeman did, and carried him into the caboose.

Q. Who got the rope?

A. I think the W. C. brakeman got the rope to tie up his leg with.

Q. About this fireman, I want to know where you met him?

A. I should judge about a car-length from the caboose, going towards his engine.

Q. You knew that fireman?

A. I knew him by sight, not by his name. I knew that he was working for the Wisconsin Central road as fireman.

Q. Did you go to the caboose?

A. I did, sir.

Q. Did you go into it?

A. I did.

Q. Who did you see there or find there?

A. Why, I saw a man or two in there, is all.
Q. See a dog there?
A. No, sir, I didn't see no dog, didn't pay any attention to the dog.
Q. Did you come right back?
A. I went back and helped to get the fireman in the caboose.
Q. Who helped you?
A. Three or four different ones; I couldn't tell their names. Three or four of us got him in the caboose.
Q. I understood you to say you had worked for the Northern Pacific Terminal Company there?
A. I wouldn't say whether I was on their pay-roll or the Wisconsin Central.
Q. You had worked for them?
A. I had worked for them quite a number of years.
148 Q. Were you familiar with the custom as to protecting trains and sending out signals?
A. Yes, sir.
Q. At that place at that time?
A. Yes, sir.
Q. What was that custom?

Objected to as incompetent, irrelevant, immaterial, because the rule just introduced is the best evidence. Objection overruled. Exception by defendant Wisconsin Central Company.

Q. You say you were familiar with their custom?
A. Yes, sir.
Q. Tell what was done.
A. They were in the habit, in case of unusual delay, to send a flagman out to protect the rear end.
Q. What companies did that?
A. All companies was supposed to do it, using the Chicago & Northern Pacific track.

Cross-examination.

By Mr. GILL:

Q. What were you doing about ten car-lengths away from the Wisconsin Central engine?
A. Making up train 27.
Q. On what track?
A. On track No. 1.
Q. Isn't it a fact that that train was already made up and on track No. 3?
A. No, sir.
Q. Wasn't that the train?
A. What you think was track No. 3 came the center track and then No. 1 track.
Q. No. 1 track in the yard?
A. The third track, third track from the main line.
149 Q. Wasn't the train all made up and ready to go out?
A. No, sir, it wasn't ready.

Q. What were you doing in there at the time in making up the train?
A. I was in charge of the engine.
Q. Where was the engine?
A. What engine—my engine?
Q. Yes.
A. Working on the working lead.
Q. What were you doing, what particular work were you doing?
A. I was throwing switch, and gave orders for the men to cut off certain cars.
Q. Which side of No. 1 track was you working?
A. On the south side.
Q. So that in making up the train, the track was between you and the Wisconsin Central engine at that time?
A. It would be, yes. It would be east of me, because we kicked the cars down by where I am working.
Q. What called your attention to the engine stopping there?
A. Their whistling. They usually always did come up and whistle for the brakeman, stop there for the brakeman.
Q. Didn't they whistle while the engine was in motion, too?
A. They did some.
Q. How did you know they would stop this time?
A. Because they didn't pass by where I was, after whistling. I could see them standing there afterwards.
Q. How do you know they were standing there?
A. I could see they wasn't moving.
Q. What date was this?
A. I believe it was in March, 1894.
150 Q. Do you remember making a written statement in this case about that time?
A. No, not that time.
Q. Shortly after?
A. A year or so afterwards.
Q. It was in that same year, wasn't it, the 31st day of October—a little before that?
A. I couldn't say. I wouldn't give the date on it.
Q. I show you a paper headed "George Packer says."
A. Yes.
Q. Turn over to a certain page, and I ask you if this is your signature?
A. Yes, sir.
Q. Dated on the 3rd of November, 1894?
A. Yes, sir, I signed it.
Q. And that was your statement at that time, was it?
A. Yes, sir.
Q. Now, does this statement made at that time contain the facts of the case?
A. As far as I can remember it.
Q. Which would be most likely to be correct, your memory then or your memory now?
A. There is some things you ask me questions about when I am

busy at work, I wouldn't remember, but if I sat down I would think of them. I have thought over it, since I know I am to come up here.

Q. When were you called?

A. I was called on last Sunday.

Q. In this statement did you use this language or make this statement: "The 104 W. C. Grant engineer, fireman I don't remember, had pulled along on main line and slacked up and I was told

151 came to a stop"?

A. No, I didn't understand that part.

Q. And you think your statement now is more correct than your statement taken six or seven months afterwards?

A. I think it is.

Q. Also this statement: "I was about ten cars west of her when she slowed up and next I heard was a crash and I ran back to scene of trouble." Is that true?

A. Yes, sir.

Q. Now, do you state that it was after she stopped that you heard the crash?

A. After she stopped that I heard——

Q. Isn't this true: She slowed up and the next you heard was the crash?

A. Well, I didn't understand him. That man wrote the statement down and came to me and asked me to sign it.

Q. He read it over?

A. He read what is——

Q. How do you know he didn't read it all over?

A. I don't remember whether he did or not—if he was reading that part.

Q. Did you also make this statement: "I heard Grant whistle immediately before I heard crash of collision; he whistled for brakes"?

A. I heard an engine whistle.

Q. You don't know whether it was Grant or the other engine?

A. I wouldn't be sure whether it was Grant or the other. I heard the first locomotive come up there west; just before the crash, I heard another one. I supposed it was Grant whistled.

Q. Now, you state that the testimony you give at this time is more correct than the statement you made in writing at that time in November?

152 Mr. LOVELY: I object to that; because it assumes something that he has not admitted that he said, your honor.

The COURT: Just change the form of your question. Say than the document signed by you.

Q. The document which I have shown you, purporting to be your statement?

A. Yes, sir.

Q. Do you then mean to say that the testimony now given here by you regarding these circumstances is more correct than the statement which I have shown you purporting to be the statement that you made at that time?

A. Yes, sir.
Q. You were busy all this time doing your work, making up the train?
A. When the accident happened?
Q. After you heard the engine coming and before the accident?
A. Yes, sir.
Q. And on the other side of the track on which you were working?
A. Yes, sir.
Q. And about ten car-lengths?
A. About ten car-lengths, I should judge.
Q. West?
A. West of where the W. C. engine was, yes, sir.
Q. About how many car-lengths is that?
A. It would be about three or four car-lengths I should judge.
Q. Three or four; that would be about 105 feet south?
A. About 110 or 120 feet.
Q. Three or four hundred feet west?
A. Yes, sir.

153 Redirect examination.

By Mr. LOVELY:

Q. This statement Mr. Gill has shown you, what is there about it?
A. A man came to me and got the statement when I was busy in the evening.
Q. Who wrote it down? Did you write it down?
A. No, sir; I did not.
Q. Did he read it over to you, any statement differing from what you have made here today?
A. Not that I know of. I don't remember of it.

WILLIAM DEVERAUX, sworn as a witness in behalf of plaintiff, testified:

Examined by Mr. LOVELY:

Q. Where do you reside?
A. Chicago, sir.
Q. What is your occupation?
A. Engine watchman on the Milwaukee road.
Q. How long have you been working for the Milwaukee folks?
A. About sixteen months.
Q. Previous to that time by whom were you employed?
A. Chicago & Northern Pacific.
Q. How long had you been at work for the Chicago & Northern Pacific?
A. About three or four years, something like that.
Q. Where were you at work?
A. Robey street.
Q. In what capacity, what were you doing?
A. I was hostler, taking the engines in the house.

Q. Did you take out engines for all companies there?
A. Yes, sir.
154 Q. You will have to speak loud.
A. Yes, I took them out for all the companies.
Q. Do you know what the regular time, the customary time for the leaving of the Great Western engine was?
A. Oh, I believe 8.20, sir.
Q. And you know the leaving time of the Wisconsin Central?
A. 8.35 Wisconsin Central.
Q. You remember the night of the injury to Mr. Smithson?
A. Yes, sir.
Q. You remember of the Wisconsin Central engine coming out that night?
A. No, sir, I don't. I got her out of the house and got her on the track and went about my business. I stood around there a while.
Q. What engine was it that you got out of the house before you went about your business?
A. 104.
Q. Was it the Wisconsin Central?
A. Yes, sir.
Q. Who was the engineer on that engine?
A. Mr. Grant.
Q. And who was the fireman?
A. Dolan.
Q. Do you know his first name?
A. William.
Q. Was there anybody else on that engine when you delivered it over to them as hostler?
A. No, sir, I didn't see anybody.
Q. Do you know what time it left to go out to Central avenue?
A. No, I don't.
Q. Did they have anything on the engine at all?
A. I didn't see none there.
Q. Do you know of a dog being around there?
A. Yes.
155 Q. Tell us about that.
A. Well, the fireman come in and said—come in the house with the dog; got him on a chain, and I was sitting there with a lamp in my hand. I says, "What you going to do with the big devil?"
The COURT: You mustn't tell what you said. Tell what you saw, not what you heard.
A. The dog was there. I merely said, "What you going to do with him?"
Q. Don't tell what you said or who said.
A. I saw the dog there. I was sitting on the seat, and I look at him.
Q. Did you see who put on the engine?
A. The fireman, Mr. Dolan.
Q. What engine did he put that dog on?
A. 104.

Q. State whether or not they had that dog on the engine when you left them and they took charge of it.

A. I saw the dog put on the engine and went down the yard about my work.

Q. They had the dog, had they?

A. Yes.

Q. That is, after you delivered the engine to——

A. Yes.

Q. Did you see the dog after that?

A. No, I didn't.

Q. What sort of a looking dog was it?

A. It was kind of a light brown dog.

No cross-examination.

MATHEW H. LONG, sworn as a witness in behalf of plaintiff, testified:

Examined by Mr. LOVELY:

156 Q. Mr. Long, what is your occupation?

A. Railroad conductor.

Q. Were you at the place of this collision that has been described here by witnesses?

A. Yes, sir.

Q. Were you on the engine that ran from the round-house, the Robey Street round-house down to the place of the collision?

A. Yes, sir.

Q. Where were you on that engine?

A. Sitting on the left-hand side of the engine on the fireman's box.

Q. What were you doing there?

A. Oh, occasionally ringing the bell, crossing over crossings.

Q. How far is it from Robey Stre-t round-house down to the place where the collision occurred?

A. Four miles and four-tenths.

Q. Four and four-tenths miles?

A. Yes, as near as I can——

Q. Were you keeping a lookout just before the collision?

A. Yes, sir.

Q. Did you see any signals given at all by swinging a lantern or anything of that kind?

A. No, sir.

Q. Did you hear any torpedo go off or anything of that kind?

A. No, sir.

Q. When did you first discover, if at all, the Wisconsin Central engine before the collision?

A. About 200 or 250 feet before we—that is, I discovered the red light on the rear end of the engine, I should think about 200 or 250 feet before we struck.

157 Q. Could you tell whether that engine was standing still?

A. No, sir.

Q. It was there, and did you stay on your engine till you got up to it?

A. Yes, sir.

Q. Right in the place you were?

A. Right in the place.

Q. What did the engineer of your engine do?

A. Reversed his engine, set his air.

Q. How hard did it strike?

A. Well, I can't describe in pounds or weights. The pressure of it struck, in striking the other engine.

Q. What sort of a jar?

A. It gave a heavy jar, heavy enough for to break the pilot, the front beam and the headlight of the Great Western engine 133, and also shoved the tank of the Wisconsin Central engine 104 forward off its frame in towards the cab.

Q. Did you get down off from your engine?

A. After the collision, yes, sir.

Q. Did you go over to the Wisconsin Central?

A. Yes, sir.

Q. Who did you find on that engine?

A. Mr. Grant, the engineer.

Q. Was the fireman there?

A. I didn't see him.

Q. Would you have seen him if he had been there, could you have seen him if he had been there?

A. I think if he had been in the engine I would have saw him.

158 Cross-examination.

By Mr. GILL:

Q. What did you first see of the Wisconsin Central engine ahead of you?

A. When did I?

Q. What did you first see?

A. Well, I first saw a red light.

Q. Where was it?

A. On the right-hand corner of the engine. That would be the north rear end of the tank, I should say.

Q. The tank of the W. C. engine?

A. Yes, sir.

Q. Where was your engine then with reference to the W. C. engine?

A. I should think between two hundred and three hundred feet. It might be a little over when I saw the red light first, but I am not quite positive in regard to that.

Q. Did you say anything to the engineer?

A. What engineer?

Q. Your own engineer.

A. I don't remember.

Q. Did you call his attention to it?

A. I think I said something about a red light, but I am not just exactly positive.

Q. What would you naturally do under those circumstances, Mr. Long?

A. My first impression specially was when I saw that red light it was the switch-light about Central avenue. That was half a mile still further on. And I think I didn't say anything for a minute or two, at once. I thought it looked a little closer.

Q. What did you do?

A. I said "Oh"—something like that.

159 Q. Call his attention to it?

A. I saw him reverse his engine at the time.

Q. Had he reversed it before?

A. Just about the same time.

Q. Whether you spoke to him first?

A. I don't know exactly. I don't know exactly.

Q. You kept your eyes on the red light all the time?

A. I can't say I kept my eye on the red light all the time. I saw the red light shine on the tender.

Q. Did you get up at all?

A. No, sir.

Q. Sat still?

A. Never get behind the boiler. I sat still.

Q. You were waiting for a chance to get out that end door, I suppose?

A. No, sir, that wouldn't be the place.

Q. Was the W. C. engine moving when you struck her?

A. I couldn't say.

Q. When the collision occurred?

A. I couldn't say.

Q. Did you notice any effort of the engine in exhausting steam or moving?

A. I did not.

Q. Didn't have time to think of that?

A. I didn't think of it just then.

Q. Even if you were 300 feet away and your engineer reversed and set the air, wouldn't you have stopped in that distance?

A. Well, at the rate of twenty or twenty-five miles an hour it would be a very hard matter, almost impossible, to stop in that distance.

Q. Was that the rate of speed you were going?

160 A. I think about that, between twenty and twenty-five miles an hour.

By Mr. LOVELY:

Q. One question or two. Do you know what the custom was in putting out signals, red lights on engines, running through the yards there?

A. Yes, sir.

Q. What was it?

A. Well, the custom was that on those light engines, some would

carry one, and some were carrying two red lights on the rear. According to the rules why we should carry two. At least all engines should—our trains.

Q. Carry two lights?

A. Two red lights on the rear.

Q. But one on this?

A. There was only one to be seen that I saw.

Recross-examination.

By Mr. GILL:

Q. Was there anything to obstruct your vision from 48th street to Central avenue?

A. Yes, sir.

Q. What was it?

A. The curve.

Q. After you had passed the curve west of 48th street was there anything?

A. Well, the smoke from a passenger train, I believe; it was Wisconsin Central train No. 8 met, I think, generally about the west end of that curve, as near as I can remember; the smoke did drive some.

Q. That is a very slight curve, isn't it?

A. I think it is about an eighth of a mile.

161 Q. Where is the west end of the curve with reference to 48th street?

A. It is about an eighth of a mile from 48th street, the east end of the curve.

Q. No, the west end towards Central avenue; how far west of 48th street is the west end of that curve?

A. I think it is about three-eighths of a mile.

Q. Look at that map and see if you recognize it, being Ex. A. That being Central avenue and this being 48th street at the east end of that map?

A. Yes.

Q. Can you see any curve on there as you go west from 48th street towards Central avenue?

A. I don't see a great deal of a curve. You see a little here.

Q. Isn't that an exact representation of the track?

A. I don't really think it is.

Mr. GILL (to Mr. Lawler): Is this, Mr. Lawler, supposed to be a correct map?

Mr. LAWLER: Yes, generally correct. I don't know whether it shows all the details or not.

Q. I mean as to this curve and the locality of it. Do you see any curve west of 48th street?

A. I know there is a curve there, but I don't see much of a curve here. There is a little here, close by, it seems, near the belt crossing.

Q. This is 48th street. Isn't it a fact that the west end of that

curve stops just a short distance west of 48th street according to this map?

A. Very close on to three-eighths of a mile. No, I couldn't see half a mile, it is about half a mile between Robinson's ditch

162 where the accident occurred and 48th street, and the curve is about one-third of that distance.

Q. One-third of half a mile?

A. The curve doesn't start at 48th street. It starts pretty near a third west of 48th street, where that curve is.

Q. A third of the distance between Robinson's ditch and 48th street?

A. Yes.

Q. Where that curve starts?

A. Running easterly between 48th street and——

Q. Isn't it a fact according to this map it isn't any such thing, it starts at the east end of that yard?

A. This yard starts at almost 48th street.

Q. Isn't it a fact that the track is straight from almost the east end of that yard west to Central avenue?

A. The curve is further west than that.

Q. How far do you say it ends, coming around between 48th street and Central avenue?

A. One-third of the way.

Q. To Robinson's ditch?

A. ⅓ of the west end is between 48th street and Robinson's ditch, is where the west end of this curve is.

Q. How far from Central avenue is this curve with reference to Robinson's ditch?

A. Pretty close onto three-fourths of a mile; not quite that.

Q. Let me see. Robinson's ditch is half a mile west of 48th street?

A. Yes, sir.

Q. The curve ends between Robinson's ditch and 48th street, don't it?

A. Yes, sir.

Q. Therefore, can it be possible that the curve is three-fourths of a mile west of 48th street and still east of Robinson's ditch?

A. I said at Central avenue.

163 Q. No, you didn't.

A. That is what I meant.

Q. Now, tell me then how far the track is absolutely straight, that is, as near as may be, east of Robinson's ditch towards 48th street—get that in your mind.

A. Well, about an eighth of a mile east of Robinson's ditch to the curve.

Q. Then there was an eighth of a mile straight track?

A. There is about that.

Q. You don't know anything about whether that map is correct or not?

A. Well, it doesn't look of course——

Q. It doesn't agree with your recollection, is that it?

A. Seeing the map and the recollections I have of the track, I think it doesn't show quite as much curve as what there is.

Q. You haven't seen the track for three years about?

A. I rode over it once or twice since; rode over it a good many times before.

Q. You were on the north track coming west, were you?

A. Yes, sir.

Q. And there were no other tracks north of the track you were on?

A. No, sir.

Q. No train of any kind between Robinson's ditch and 48th street when this happened?

A. None close to the track.

Q. So you had an unobstructed view along the track after you struck the first part of it?

A. Yes, sir, excepting for the smoke that the train had made.

Examined by Mr. LOVELY:

Q. I want to know something about this matter. You
164 know where Robinson's ditch is of course?

A. Yes, I know just about where it is.

Q. Approaching Robinson's ditch from the Robey Street round-house how far is the track straight?

A. From Robinson's ditch?

Q. Yes, east.

A. From the round-house?

Q. Yes.

A. There is that curve you speak of.

Q. Before you get to the curve?

A. Going west from Robey street?

Q. No, from Robinson's ditch how far east is the track straight?

A. Well, after you pass Robinson's ditch going east there is but very little over an eighth of a mile straight track between that and the curve.

Q. That is going towards the round-house?

A. That is going towards the round-house.

Q. And it is about an eighth of a mile where it is straight?

A. Yes, I think that is about the distance.

FRED L. FRAZIER, sworn as a witness in behalf of plaintiff, testified:

Examined by Mr. LOVELY:

Q. Where do you reside?

A. Chicago.

Q. What is your occupation?

A. Driver in the fire department.

Q. Now in the employ of the city of Chicago?

A. No, by the Cicero Fire Department.

Q. Do you remember the night of this collision?

A. Yes, sir.

Q. What were you doing that night, Mr. Frazier?
A. I was riding on the engine.
Q. Of what company?
—. Of the Chicago Great Western.
165 Q. Were you at that time in the employ of the Chicago, Great Western?
A. Yes, sir.
Q. In what capacity?
A. As a brakeman.
Q. What was your custom in going down from the round-house down to——
A. To Central avenue?
Q. Yes.
A. To get on the engine and ride out there. We don't get any pay until we leave Central avenue. We were dead-heading.
Q. You were down on that night. Did you know of the Wisconsin Central going out?
A. Yes, sir.
Q. Engine going out?
A. Yes.
Q. How long before you went out did the Wisconsin Central engine go out?
A. About ten minutes.
Q. What did you do with your engine?
A. Well, when we left Robey street I stood up behind the engineer till I got to the belt crossing. After we left the belt crossing I got down and stood in the gangway. After we had turned the curve going down to 48th street I see the smoke. The passenger train had passed; I see the smoke and I kind of leaned out to see if they had crossed over Central avenue yet; kind of keeping a look out. The smoke cleared up, kind of a sudden, I should judge three or four car-lengths from the engine. I saw the rear end of their tank and I hollered, and I got ready to jump; just about the time I left go of the engine they hit.
Q. Could you see whether the engine ahead of you was standing still or moving?
166 A. I couldn't tell that. I know when the engineer whistled for brakes he pulled his engine wide open and it was standing there and slipping.
Q. Which engine?
A. The Wisconsin Central engine.
Q. Was you still on when you saw that?
A. I was just getting ready to jump.
Q. The Wisconsin Central engine whistled?
A. No. The Great Western whistled; and the minute he saw it he threw it over; he saw it about the same time I did. He put on his air and whistled for brakes; gave one whistle and I jumped.
Q. That is your engineer?
A. Yes, sir.
Q. What did you say you saw on the Wisconsin Central?
A. I see the tank, the rear.

Q. What about the wheels?
A. I could see it slipping, see the sparks flying.
Q. Had the sparks been flying before that?
A. I didn't see the engine until that time.
Q. After that did they fly?
A. Yes, sir; the minute he whistled you could see her stand there and slipping, trying to get out of the way.
Q. What would cause, if you know, the slipping?
A. Well, he pulled her throttle too wide open, gave her too much steam.
Q. Well, if an engine has been standing still and puts on the steam suddenly, will it cause that slipping?
A. Yes, sir.
Q. Do you remember your engine striking the forward engine?
A. Yes, sir.
Q. What did you do then? Go right on and tell us about it.
167 A. I jumped. I let loose of the engine and jumped to the ground just at the same time it hit. I rolled about a hundred feet, I suppose—felt like it, anyway. Just as soon as I recovered from the shock, I was dodging, I thought the cills and iron were flying around there. I got up and I seen my partner run by. He jumped off before I did. He hollered to the conductor that I was there with my leg off. I heard him holler that "Frazier is there with his leg off, cut his leg off"—told the conductor or somebody there anyway. So I got up, and when I got up on the track I seen Smithson lying there fastened with the flesh of his leg to the rail mangled up. He was flouncing along like an animal with its legs off. I tried to pick him up, and he was fast. He was mashed right into the rail where the two joints of rail came. I dragged him, loosened the flesh and cords out of there and gathered him up in my arms and carried him direct to the cars, to the Wisconsin Central caboose. And I tried to get him in, but I was exhausted, so exhausted I didn't have the strength. I had him on my knee and they kicked in, struck the cars on the caboose, and that of course jerked me loose; kicked the caboose down, and I laid him down between the tracks. And Mr. Larson came running over there and I asked him for a rope so I could tie his leg up. He was bleeding to death. He was so badly scared, the same as everybody else was at the time, that he brought me a pair of overalls, and I went and found the W. C. brakeman. He was coming up just at the
168 time and I asked him to help me. He claimed his arm was hurt, was sore, rather. And I met the fireman, the fireman and me carried him back.
Q. What fireman?
A. The Wisconsin Central fireman.
Q. What was his name?
A. I couldn't tell you his name.
Q. Where did he come from?
A. I met him about three car-lengths from the caboose; he seemed to be coming from the west.

Q. That is, from the direction of the caboose?

A. No, the opposite direction. Him and me carried him to the caboose and one of the switchmen, I don't know who it was, helped us in with him.

Q. You went into the caboose, did you?

A. Yes, sir.

Q. What did you do when you went into the caboose?

A. The first thing I done, I got one of the men there to give me a rope so I could tie his leg, put two ropes on, which stopped the blood; and then I went back in the back part—my partner had his arm hurt, face pretty badly cut up so he thought he would faint, and I put water on his face. I wiped Mr. Smithson's face off and sent a man after some liquor.

Q. Was that while you were on the caboose?

A. Yes, sir.

Q. What did you find in the caboose?

A. I seen a dog there.

Q. Where was the dog?

A. He was in the baggage part of the caboose.

Q. Was there a partition in the caboose?

A. Yes, sir; there is a door that leads into it.

169 Q. How large a dog was this?

A. He was a pretty good-sized dog. I couldn't take particular notice of it because I was busy.

Q. Was he loose or was he chained?

A. He was chained, or tied anyway I couldn't swear whether he was chained or not.

Q. What caboose was that?

A. Wisconsin Central caboose.

Q. Was that the caboose that should be attached to the Wisconsin Central train?

A. Yes, sir.

Q. Or engine?

A. Yes, sir.

Q. What was done with Mr. Smithson at that time?

A. Well, we took and dressed him up and they got a switch engine around to the rear of the caboose and took him to Robey street and telegraphed for a patrol wagon or ambulance and took him from there to the hospital.

Cross-examination.

By Mr. GILL:

Q. Mr. Frazier, an engine will slip any time when she gets too much steam whether moving or standing?

A. Yes, sir; that is, put on suddenly.

Q. Also when she has too much weight behind her, whether moving or standing?

A. Yes, sir.

Q. Now, you say you met the W. C. fireman some three carlengths from the caboose?

A. I should judge about that, yes, sir.

170 Q. From which direction was he coming, from the caboose or from the engine?

A. Coming up along the train.

Q. From the direction of the engine?

A. Yes.

Q. From the west?

A. Yes, sir.

JAMES H. KELLY, sworn as a witness in behalf of plaintiff, testified:

Examined by Mr. LOVELY:

Q. Mr. Kelly, you are the division superintendent of the Chicago, Great Western, I believe?

A. Yes, sir.

Q. Of what division?

A. Chicago division.

Q. What does that division include?

A. It takes in Chicago to Dubuque, Iowa.

Q. From Chicago city?

A. Including the city of Chicago.

Q. Does that take in the track, the control of the road?

A. Over this——

Q. Tracks and terminals of the Chicago & Northern Pacific?

A. Yes, sir. We operate over their tracks at Chicago.

Q. These rules that you have referred to during this trial, were they in force at the time when the Chicago & Northern Pacific——

A. They were.

Q. At the time of the injury?

A. Yes, sir.

Q. Were there any additional rules that your company made relative to the taking out of the engines (general rules) from the round-house at Robey street that would apply to that round-

171 house?

A. The rules for the governing of all trains operated over those tracks are made by the officers of the Chicago & Northern Pacific Company.

Q. And you made no special rules—your company made no special rules with reference to that matter?

A. None in so far as the operation of the engines or trains are concerned.

Q. Or the leaving time of the trains?

A. We order trains or engines to leave at a specified time, for specified work.

Q. Was there any general rule made by your company to the effect that those rules of the Northern Pacific should be obeyed and followed by your employés?

A. Yes, sir. Instructions to our employés are that they shall be governed by the rules of the Chicago & Northern Pacific while operating on their tracks.

Q. Do you know whether that is a fact with reference to the other companies that run in over the Chicago & Northern Pacific terminals?

A. I know that it is a common custom. I don't know just what instructions they may have for their employés. I think, however, that they have a notice to that effect on their time-table.

Q. Did you have any time-card for the running of engines, your engines, over the tracks of the Northern Pacific?

A. There is none of our trains or engines given a schedule time over the tracks of the Chicago & Northern Pacific except passenger trains. All freight trains and freight engines—light engines—
172 run under the heading of yard engines with no rights except those of an extra engine—no time-table rights.

Q. Until they get to Central avenue?

A. Forest Home.

Q. Do you know the distance between Cottage avenue and——

A. Central avenue?

Q. Yes, sir, Central avenue.

A. Central avenue and what other point?

Q. 48th street and Central avenue.

A. They are both on section lines, just a mile apart.

Q. This Robinson's ditch——

A. That is on the half-section line, just half a mile from each of the others.

Mr. GILL: You are only testifying on that from hearsay? You never ran out those lines? This is what you have been told, that they are section lines?

WITNESS: No, I never had any one tell me, that I know of.

Q. You say there was no time-table; you didn't make one nor require your employés to run with reference to any time-table. You treated them as extra trains?

A. Yes, sir.

Q. At that time?

—. ——.

Cross-examination.

By Mr. LAWLER:

Q. Mr. Kelly, state whether or not it is a fact that the tenant companies using the terminal property there (the Wisconsin Central, Baltimore & Ohio, and the Chicago, Great Western) operated
173 their trains under the rules of the Chicago & Northern Pacific Company that have been put in evidence here.

A. All of them are required to do so.

Q. I call your attention to this time-table of the Wisconsin Central Company. State whether that was the time-table that was in force on the Wisconsin Central lines in March, 1894.

A. With your permission I will refer to a copy I have.

Q. Yes, certainly, Mr. Kelly.

A. No, sir, that is not a copy.

Q. What is this document you hold in your hand, Mr. Kelly?
A. Wisconsin Central time-table No. 1. That took effect November 12, 1893, at 10 o'clock a. m.
Q. State whether that was in force on March 7, 1894.
A. That is in effect until April 8, 1894; yes, sir.

Mr. LAWLER: I desire to offer this in evidence, your honor, as Ex. 1 of the Chicago, Great Western Railway Company and call the jury's attention in particular to this clause of the time-table.
Mr. LOVELY: No objection.
Paper marked. Def'ts' Ex. 1, C. G. W., and admitted in evidence without objection.
Mr. LAWLER: I call the attention of the jury to this clause which I have marked: "All conductors and engineers must provide themselves with time-tables of the C. M. & St. P. and Chicago & Northern Pacific railways and be governed by them when running over their tracks."
Mr. LOVELY: That is the Wisconsin Central?
Mr. LAWLER: Yes, sir.

174 By Mr. LOVELY:

Q. You were division superintendent at the time of this collision. About how many trains a day passed over this place of this accident at that time?
A. Well, I could only give an approximate estimate of the number for the reason that there is only comparatively few trains that are shown on the schedule.
Q. I mean taking in all?
A. I should say as an estimate there was at that time perhaps 100 engines in twenty-four hours.
Q. There were a good many engines that were called extras liable to pass there without any warning or without any reference to any schedule.
A. We figure in estimating the number of trains that an engine is a train whether she has cars or not.
Q. Yes, I know that. A good many of those were not shown on the time table and are considered as extra trains?
A. Yes, sir.

The plaintiff rests.
Testimony closed.

Mr. LAWLER: I waive any opening address to the jury, and defendants' counsel stipulate that the fifth folio of the answer of the Chicago Great Western Railway Company may be accepted as true.
It is admitted that the common law as interpreted by the decisions of the State of Illinois would not authorize a recovery in this
175 case for the negligence of the engineer and fireman of the Chicago, Great Western Company as against such Great Western Company.

The defendant Chicago, Great Western Railway Company rests.

The defendant receivers waive opening argument and rest their case.

Mr. LAWLER: Your honor, in behalf of the Chicago, Great Western Railway Company, I move that the jury be instructed to return a verdict in behalf of said defendant. The motion, may it please the court, is based upon the contention that the evidence does not sustain the allegations of the complaint as to the negligence alleged against the defendant Chicago, Great Western Company.

After argument, the court said: "I think the law as properly applied to the testimony presented in this case obliges the court to grant the motion as to the defendant Chicago, Great Western Railway Company because they had, as appears from the testimony of the witnesses, adopted a set of rules which it seems to me, after hearing the evidence and after examining these rules carefully, as I did myself personally, *to* amply cover all the contingencies arising in the prosecution of the various duties incident to railroad service at the point. The motion is granted as to the Chicago, Great Western Railway Company."

Exception by receivers.

Mr. GILL: If the court please, it now being held that there was no joint cause of action set out in the complaint and that the
176 cause of action alone was against the Wisconsin Central receivers as set out and that a directed verdict has been ordered for the defendant Chicago, Great Western Railway Company, the defendants the receivers of the Wisconsin Central Company ask permission to file a petition for removal supplementary to the petition already upon file to the end that the case may be removed and their rights protected as receivers in the Federal court. It will take me some little time to amend that petition and procure the bond.

Motion denied.

Exception by receivers.

Mr. GILL: The defendants, the receivers of the Wisconsin Central Company, move that the court direct a verdict in favor of the defendants for the reason that the complaint does not state sufficient facts to constitute a joint cause of action; that the plaintiff has not shown any joint cause of action; that the plaintiff can recover only upon the pleadings upon a joint cause of action which has been attempted to be set out if the joint cause of action exist; and for the further reason that the proof as it now stands has not shown any negligence for which the receivers as masters in the case or as the superior of the engineer and fireman upon the engine of the Wisconsin Central which it is claimed was involved in this collision are responsible. And whatever negligence has been shown, if any, in regard to those servants is not shown to have been the proximate cause of this accident.

177 Motion denied.

Exception by defendant receivers.

Mr. GILL: Bro. McDonald suggests it is necessary to make the offer to file a bond and petition for removal, in order to make the record complete.

The COURT: I presume you would have no objection, Bro. Lovely, to waiving the actual proffer or tender of the bond and petition, and let it be considered as having been offered?

Mr. LOVELY: Yes, sir.

Mr. GILL: He says he waives that and considers it as filed.

The COURT: All other proceedings in this case will be taken as being had in view of an actual proffer of a bond and petition for removal.

Mr. LOVELY: I have no disposition to prevent a proposition of law being presented by any counsel in the case. I am willing to waive it.

The COURT: It will be so considered.

Court here adjourned until Thursday morning, April 22, 1897.

Court having convened pursuant to adjournment, the trial proceeded as follows:

Mr. GILL: If the court please, we present our petition for removal, which we said yesterday we would present this morning, on which we made the argument and motion to remove; not presenting any bond, counsel on the other side waiving the bond, or referring to the bond already on file. Is that consented to?

Mr. LOVELY: I don't care anything about your bond. I
178 understand the court denied the application, and the purpose of the counsel is to make his offer. I have no objection to that.

The COURT: Now, gentlemen of the jury, I have decided that upon the evidence submitted the plaintiff is without a cause of action as regards the Chicago, Great Western Railway Company. Therefore it is your duty to return a verdict in favor of that company. That may as well be done now. I have prepared a form of verdict which it is your duty to return. Mr. Howard may step down here, (I will appoint him foreman of the jury for that purpose,) and sign this verdict, which may be recorded now.

The jury thereupon returned a verdict as directed, in favor of the defendant The Chicago, Great Western Railway Company.

After argument by Mr. Gill on behalf of the defendants and Mr. Lovely on behalf of the plaintiff, the court instructed the jury as follows:

Charge.

GENTLEMEN OF THE JURY: The cause which has been presented to you, both by testimony and by argument, has been instituted by the plaintiff to recover damages for what is termed a personal injury. He bases his claim upon the negligence of the defendants. He says that these defendants were wanting in that ordinary and reasonable care and prudence which is an obligation resting upon all persons in civil society; resting upon natural persons and artificial persons. A corporation is an artificial person; it is an entity
179 created by law consisting of the aggregated energies and resources of various individuals, combined for the purpose of

transacting some enterprise. A corporation is, under the law, a person, bound to the same obligation, subject to the same responsibility as a human being.

The gist of this action is negligence. Negligence is a want of ordinary and reasonable care and prudence. The plaintiff says that the defendants were negligent. Negligence is not to be assumed. If it exists, it is a fact which must be proven like every other fact. Unless the facts as disclosed by the testimony in this case exhibit to you that want of ordinary and reasonable care and prudence on the part of these defendants which constitutes negligence, the plaintiff cannot recover. If the evidence does show to you that the negligence of the servants of the Wisconsin Central receivers was the cause of this accident, (the unfortunate accident described in the testimony) that this plaintiff himself was at the time of the accident exercising ordinary and reasonable care and prudence in performing his services for his own company, protecting his own safety, then he is entitled to recover full compensation for the injuries which he has sustained.

Under our system of jurisprudence, the jury are exclusive judges of all questions of fact. The principal question of fact in this case is the existence or non-existence of negligence on the part of the servants or agents of the receivers of the Wisconsin Central
180 Railway Company. The corporation is responsible for the negligence of its servants, and when receivers or officers or trustees appointed by a court, take charge of a railroad and its effects, the receivers are responsible for the acts of their servants and agents; for the acts of a railway company, for the conduct of the engineer, fireman, switchman, yardmaster and other functionaries of a railroad company, while acting within the scope of their appointed duties. And when we speak of the negligence of the receivers in this case, in connection with the testimony at the trial, we mean the negligence, if it exists, of the servants and agents engaged in the management of the trains and regulation of the railway tracks.

Now, you are to determine for yourselves, without any hint or suggestion or influence from the court, whether negligence existed in this case or did not, the extent of that negligence, its effect, its relation to the acts of other persons. You are to find out from the evidence by a careful, patient, calm, unbiased investigation what the facts really were; which side represents the truth of this controversy; then you are to declare the result, without either fear, prejudice or sympathy, without hesitation upon any ground whatsoever.

As you are to determine the facts, and according to your oath your determination is to be based upon the testimony given in court, the law wisely provides that the jury are also exclusive judges of the relative credibility of all the witnesses.
181 No testimony has been introduced in this case on behalf of the defendants, but comment has been made upon the relative credibility of various statements made by the witnesses presented in behalf of the plaintiff. You are to consider the manner and bearing of each witness as he appears and gives his testimony, his means of knowledge with reference to the circumstances as to

which he assumes to testify; his bias, prejudice, or his frankness, sincerity and candor, as the case may be; the interest or want of interest in the result of the litigation—because human experience has shown that an interested witness is more apt to be lacking in candor and sincerity in giving his statement than a witness who is entirely disinterested. Following these canons of estimation, you will find for yourselves which of the witnesses present the strongest reasons for credibility, which of the statements made by them are the most credible; and you will pin your faith, rest your verdict, upon that testimony which in your calm judgment finds the best claim to be credible and most worthy of confidence.

The burden of proof rests upon the plaintiff. In order to recover, the preponderance of the testimony must favor the claim made by the plaintiff. The general rule is that he who alleges the existence of any fact must prove it. The plaintiff has alleged the existence of negligence in this case. It is incumbent upon him to prove it; and unless a preponderance of the testimony submitted favors that claim, the defendant is entitled to a verdict. If this was an un-

182 avoidable accident, one that human intelligence could not foresee and provide against, then the defendant is not liable. The defendant is only liable in case that negligence is established on the part of the servants and agents of these defendants, the receivers, which was the proximate, direct cause of the accident by which the plaintiff sustained the injury.

The negligence which the plaintiff claims to have existed is said to have consisted in violating the rules which have been offered in evidence. The rules, comprised in the document marked Exhibit A, were binding upon the plaintiff, binding upon the defendants, the receivers here, binding upon all the engine-drivers, firemen, switchmen, yardmasters and other employés of Howard Morris and Mr. Whitcomb, the receivers. The violation of these rules, when attended by a wrong, constitutes the fact of admission of negligence on the part of those who violate them. The rules are designed for a wise and beneficent purpose, to transact the business of the railway efficiently and to protect its employés and passengers, carried by and over its lines, against personal injury. The violation of a definite, well-understood rule, on the part of these defendants, may be considered by the jury as evidence of negligence, and from the violation of these rules—well understood by the persons who violated them—(if the jury should find from the testimony that such was the fact, that there was this violation) the jury may consider negligence on the part of the defendants established.

183 The learned counsel for the defendant receivers asks me to instruct you, and I do instruct you, that, "in order to find in this case in favor of the plaintiff and against the defendants, you must be satisfied from the evidence that the defendants were guilty of some lack of ordinary care at the time of the collision, and that such lack of ordinary care was the proximate cause of the plaintiff's injury."

"By proximate cause is meant the direct, active, moving cause producing the injury, and the injury must be an effect which must,

under all the circumstances surrounding the accident, have been one reasonably to have been foreseen by a person of ordinary care (ordinary intelligence) as likely to follow the lack of ordinary care."

The plaintiff requests me to say, and I say to you, that, "if the jury find from the evidence that the negligence of the servants of the Wisconsin Central receivers in not sending back a flagman or giving proper warning to protect its engine from being run into by the locomotive on which plaintiff was riding directly contributed as a cause to the injury which plaintiff has received, he is entitled to recover such damages from the receivers as he has sustained, even though the engineer of his own train was also negligent, providing, of course, that the plaintiff himself was then and there exercising ordinary and reasonable care and prudence."

184 The defense has been mentioned in the answer, that this plaintiff was injured by reason of the negligence of a fellow-servant. The fact that a plaintiff asking for damages by reason of a personal injury was injured by the negligent action of his fellow-servant is a full and complete defense. In that connection I would say to you, "the servants of the Wisconsin Central receivers were not the fellow-servants of the plaintiff, and if their negligence contributed directly to his injuries, he may recover, providing he himself was in the exercise of ordinary and reasonable care and prudence."

The servants of the receivers were operating under a different pay-roll of service; they had a different master; their compensation proceeded from a different source, and, while their services were employed within the same area, they were not fellow-servants, within the meaning of the law.

The negligence of the plaintiff himself, even though he was negligent in the slightest degree, where such negligence directly contributes to causing the accident, is a sufficient defense. The law holds, rightfully, that a man cannot take advantage of his own wrong; so that, if he, by his own negligence, helps to bring about the accident, he is barred from a recovery. The law does not proportion negligence between the parties; the plaintiff's negligence is held to defeat his recovery, on the ground that if he recovered for an accident which was partly caused by his own negligence, he would be really receiving compensation for his own negligence or wrong.

Now, as requested by the defendant, I charge you: "If you

185 should be satisfied from the evidence that the sole, proximate cause of the accident was the negligence or lack of ordinary care of the plaintiff himself, or of the engineer or crew upon his engine, or that any lack of ordinary care on the part of the plaintiff contributed to his injury, then you must find for the defendants."

The reason for mentioning the negligence of the engineer here is because the plaintiff was injured in one of three ways: He was either injured by the negligence of the engineer and fireman of the Wisconsin Central engine, which was the object against which the engine of the Chicago, Great Western railway collided—it is said by some of the witnesses that the engine stopped upon the track—it is for you to say whether it stopped upon the track—but speak-

ing of it as the engine that stopped there—either the stopping of that engine without sending back the signals was the cause of the accident, or else the carelessness of the engineer of the engine upon which the plaintiff was riding was the cause of the accident, or there was a combination of the negligence of the plaintiff and the other forms of negligence.

Now, the defense that the injury was caused by the negligence of the engineer of the engine upon which the plaintiff was riding is a good defense to this action. The receivers say, "We did not cause this injury, some one else caused it; you must bring your action against that engineer; he was the one that caused the injury." That
186 is the reason I mention this—as a circumstance, that, if proven to the satisfaction of the jury, would absolve these receivers from responsibility. If their engineer's stopping there and failing to send back signals was the cause of the accident, then they are responsible. If the engineer of the Chicago, Great Western Railway Company, by his recklessness, caused the accident, then the receivers are not responsible. Or, if the plaintiff himself failed to keep a proper lookout, did any act evincing a want of ordinary and reasonable care and prudence on his part and that want of ordinary and reasonable care and prudence contributed to causing the accident, then the plaintiff cannot recover.

If you should determine that the plaintiff is entitled to recover damages in this action, then it would be your duty to estimate the measure of damages. To measure human pain and suffering and mutilation in money is not only one of the most responsible tasks committed to a jury but it is also one of the most difficult. The limitations of our existence sometimes appear to place insuperable barriers in the way of human action, and we are obliged to measure objects widely different, either measuring one by the standard of the other or by setting up some standard which hardly seems logically and philosophically applicable. However, all we can do in the case of a wrong is to measure it in money, under our present system of civilization and the present condition of jurisprudence. So
187 you are not to shrink from that task, but you are to resolutely and patiently assume it.

If the facts warrant a recovery by the plaintiff, then you must go to work and measure up his damage in money, in dollars and cents, state by your verdict how much that amounts to, what is it. He is entitled to recover for the personal disfigurement which he has suffered, for the loss of his leg, with all the inconvenience, difficulty, lack of bodily strength, lack of working power, which that loss necessarily entailed. He is to recover not only for the physical pain which he endured, but for the mental anguish which is a necessary consequence of physical pain. He is entitled to recover damages for the mortification and regret and mental distress caused by this accident. You are, so far as possible, to give him such a sum as will be a compensation, that is, will pay him, in dollars and cents, for the injury which he has suffered, make good to him his loss. You are not to indulge in any extravagant speculation; you are not to give any damages by way of warning or punishment;

you are not to give any damages by reason of a sentiment of indignation, any resentment that may arise in your bosoms because of the supposed or actual carelessness of these defendants. You are to limit yourselves to compensation, and that compensation must be full, complete and adequate, in case you find from the testimony that this plaintiff is entitled to recover.

The testimony does not show any expenditure for medical services or for nursing or for any other resultant expenses of the accident.

188 You are simply to confine yourselves to the individual measure of damages resulting from the accident, the loss of the leg, the pain and suffering and inconvenience. There can be only one recovery by this plaintiff during his entire lifetime. If he recovers at all, he must recover now, so you will estimate the damages according to your contemplation of his future existence, bearing as he does, this severe injury which has been disclosed by the testimony. If he recovers, he recovers once for all.

Now, the public mind has, to some extent, been inflamed against corporations. It is the general rule to caution a jury against reflecting that popular sentiment. I have defined a corporation to you,—not in strict technical language, but in general terms; and I say to you, gentlemen, to the consideration of this cause you should apply all the resources of your calm, unbiased judgment. Let not prejudice enter into the spirit of your deliberations. To the correct ascertainment of the facts and the declaration thereof you are solemnly pledged by oath, calling to witness the august Creator of the universe. You have invoked his blessing upon the rightful execution of the juror's duty and his curse upon perverse disregard of that important responsibility. The litigants before you have an absolute right, under the laws of the sovereign Commonwealth of Minnesota, to an adjudication of their dispute according to the actual facts. If the defendant was in fact negligent, then so declare.

189 To declare either party negligent when such is not the fact, is to place falsehood upon the judicial record and to mock at justice. To allow sympathy for misfortune to take the place of the truth as disclosed by the evidence, is to offer sacrifice at the shrine of hypocrisy, to the all-destroying demon injustice. To allow prejudice to blind your eyes to the merits of the contention of either party is to declare that, while the facts authorize that party to prevail or to have the benefit of mitigating circumstances, you will condemn him unjustly in the cause at bar because of your belief in his general unworthiness. Personal and characteristic unworthiness of a party litigant does not warrant a descent by the oath-bound juror to the same level of baseness. Faulty character and faulty characteristics must be combatted worthily and not unworthily. To render disobedience to duty because of another's fault is to enlarge without excuse the dread catalogue of depravity. I feel confident, gentlemen, that you will avoid the errors to which I have adverted and that your solemn sense of right will effectively countervail any suggestion of dishonor.

Have you any suggestions or exceptions?

Mr. LOVELY: We have none on our side.

Mr. GILL: The defendants wish to except to that portion of the charge where it is in effect said if the negligence of the servants of the receivers was the cause of this accident and that the plaintiff's negligence did not contribute to the accident, then the plaintiff is entitled to recover.

190 Also to that portion which charges in effect that the receivers are responsible for the acts of their servants and agents, engineers, firemen, and others within the scope of their duties.

Also to that part of the charge, in speaking of the "negligence of the rec-ivers in this case is meant the negligence of their servants and agents."

To that part which charges that if this accident was an unavoidable ac-ident arising from circumstances which human intelligence could not foresee, the plaintiff cannot recover. It is to the negative part of that that we object.

To that part which charges a violation of the rules is an admission of negligence by those doing it.

To that part which charges a violation of the rules is evidence to the jury of negligence and is such as will establish such negligence.

I take an exception to the refusal of the court to give the second request as requested, and an exception to the request as given in lieu thereof.

I also except to the refusal of the court to give the third request asked by the defendants.

To that part of the charge which is in effect "if the stopping of the engine without sending back the signals was the cause of the injury, then the receivers are responsible."

To that part which charges "if the receivers violated the rules and that negligence contributed to cause the injury, then the plaintiff may recover."

191 To that part of the charge which states in effect that if the negligence of the receivers' servants contributed to the injury to the plaintiff, he may recover.

To that portion of the charge in effect giving the rule of damages that there is recovery for personal disfigurement; second, the mental anguish, and third, mortification and regret and distress.

I also except to the giving of the first instruction requested by the plaintiff.

The COURT: Gentlemen of the jury, the taking of exceptions by counsel must not be considered by you at all in finding your verdict. Exceptions are very properly taken by counsel as a means of preserving legal propositions for discussion. It is perfectly proper to take exceptions. There should be no prejudice against any one on account of that.

If you find a verdict in favor of the plaintiff, the form of your verdict will be, after stating the title of the cause, "We, the jury in the above-entitled action, find a verdict in favor of the plaintiff and against H. F. Whitcomb and Howard Morris, receivers of the Wisconsin Central Company, and assess his damages at the sum of ——" a certain number of dollars. The word "dollars" is printed in this

form. You will insert the proper number of dollars to which the plaintiff is entitled. This will be signed by the foreman of the jury and will be dated. You will appoint one of your own number foreman of the jury and through that foreman you will communicate with the court.

192 In case you find a verdict in favor of the defendants, the form of your verdict will be, after stating the title of the cause, "We, the jury in the above-entitled action, find a verdict in favor of the defendants H. F. Whitcomb and Howard Morris, as receivers of the Wisconsin Central Company." This will be signed by the foreman of the jury and dated.

I presume there will be no objection to a sealed verdict in this case?

Mr. LOVELY and Mr. GILL: No, sir.

The COURT: In case you should find a verdict while court is in session, you will return into court and present your verdict. In case you should find a verdict when the court is not in session, you will write out your verdict in the proper form, place it in an envelope, seal the envelope and deliver it to the foreman of the jury. You may then separate and go wheresoever you please. At the very next session of court that occurs after you have reached a verdict, you must assemble in the jury-box. The roll of jurors will be called and you will be asked whether you have arrived at a verdict. You will then present the envelope sealed. It will be unsealed and your verdict will be recorded and declared. This is called the process of returning a sealed verdict, and you may do so in this case providing court is not in session at the time your deliberations close.

I know, gentlemen, that you will give proper consideration to the views of one another. Of course the judgment and conscience

193 of each juror must be satisfied before a verdict can be reached, but you must among yourselves exercise that respect, for the opinion of one another and that magnanimity in yielding upon minor considerations which contributes to a calm, peaceful, friendly discussion of the whole subject and a rightful adjudication upon the questions in controversy.

A JUROR: Is it proper to ask the court a question here?

The COURT: Certainly.

JUROR: In case it is found for the plaintiff, the question of compensation is, as you say, one we have to arrive at. In determining upon that compensation, would these two points be considered, namely, the earning power of the man and his probable expectation of life?

The COURT: I think there is no doubt that you have the right to take those into consideration. You may take into consideration the age of the plaintiff and his bodily appearance and his strength, earning capacity, as a part of the factors governing your determination in case you agree the plaintiff ought to recover. As stated, you must take into consideration his pain, suffering and inconvenience in the future; that is, the curtailment of his bodily strength. You may consider his age and his earning capacity and the other circumstances that properly suggest themselves to the mind of a reasonable

man in connection with the assessment of damages. It would
194 be absolutely improper for you to compromise upon the facts and upon the measure of damages in order to reach an agreement. The plaintiff is either entitled to recover or he is not. If the facts entitle him to recover, then he should have a verdict for full and complete compensation. If the facts do not entitle him to recover, then he should not recover a small sum or any sum whatsoever. Sometimes juries will agree that the facts do not justify a recovery, but still they give the plaintiff something by reason of sympathy. But if you give the plaintiff even the smallest sum when the facts do not entitle him to it, you are robbing the defendants. If you give him a small sum when he is entitled to recover a large sum, then you are robbing the plaintiff. You must be careful to adjust your verdict so that you will be robbing no one, but do equal justice between all parties.

An officer was then sworn to take charge of the jury.

The jury then retired to deliberate.

On the morning of Friday, April 23, 1897, the jury returned into court with a sealed verdict as follows:

195 STATE OF MINNESOTA, }
County of Ramsey. }

District Court, Second Judicial District.

JOHN SMITHSON, Plaintiff,
vs.
H. F. WHITCOMB and HOWARD MORRIS, as Receivers of the Wisconsin Central Railway Company, and Chicago, Great Western Railway Company, Defendants.

Verdict.

We, the jury in the above-entitled action, find a verdict in favor of the plaintiff and against H. F. Whitcomb and Howard Morris, receivers of the Wisconsin Central Company, and assess his damages at the sum of twelve thousand five hundred ($12,500) dollars.

St. Paul, April 22, 1897.

WILBUR H. HOWARD, *Foreman.*

The court directed a stay of proceedings for forty days.

Defendant Receivers Requests.

I.

In order to find in this case in favor of the plaintiff and
196 against the defendants, you must be satisfied from the evidence that the defendants are guilty of some lack of ordinary care at the time of the collision, which was the proximate cause of the plaintiff's injury.

By proximate cause is meant the direct, active, moving cause producing the injury, and the injury must be an effect which must

under all the circumstances surrounding the accident have been one reasonably to have been foreseen by a person of ordinary care as likely to follow their lack of ordinary care.

II.

If you should be satisfied from the evidence, that the sole proximate cause of the accident was the negligence or lack of ordinary care of the plaintiff himself, or of the engineer or crew upon his engine, or that any lack of ordinary care on the part of the plaintiff contributed to his injury, then you must find for the defendants.

III.

It appears from the testimony without dispute that the crews of both engines were operating at and previous to the accident under the rules and regulations of the Chicago & Northern Pacific Railroad Company, on whose tracks the engines were, and the engines and crews were subject to the control of that company.

You are therefore instructed that even if you are satisfied from the evidence that the accident was caused by the negligence
197 or lack of care of the engineer of the Wisconsin Central engine, yet the plaintiff cannot recover in this action against the defendant receivers.

STATE OF MINNESOTA, }
County of Ramsey. }

District Court, Second Judicial District.

JOHN SMITHSON, Plaintiff,
vs.
H. F. WHITCOMB and H. MORRIS, Receivers of Wisconsin Central Railway Company, and Chicago, Great Western Railway Company, Defendants.

To J. A. Lovely and J. F. George, plaintiff's attorneys:

You will please take notice that the defendants, H. F. Whitcomb and Howard Morris, receivers of the Wisconsin Central Railway Company, propose the within and foregoing testimony as defendants' proposed case in the above-entitled action, exhibits to be attached.

Dated this 8th day of May, 1897.

McDONALD & BARNARD AND
T. H. GILL,
Attorneys for H. F. Whitcomb and H. Morris, Receivers of Wis. Central Railway Co.

198 Service of the within by a true copy thereof is hereby admitted this 8th day of May, 1897.

JOHN A. LOVELY AND
J. F. GEORGE,
Plaintiff's Attorneys.

This document having been examined by me, and having been found conformable to the truth and to contain a statement of all proceedings had and evidence offered and received at the trial of the civil action therein entitled, is hereby allowed, settled and signed as the case in said civil action.

Witness my hand — seal.

JOHN W. WILLIS, [SEAL.]
Judge of the District Court.

Saint Paul, Minnesota, May the 26th, A. D. 1897.

STATE OF MINNESOTA, }
County of Ramsey. }

District Court, 2nd Judicial District.

JOHN SMITHSON, Plaintiff,
vs.
H. F. WHITCOMB and H. MORRIS, Receivers of Wisconsin Central Railway Company, and Chicago, Great Western Railway Company, Defendants.

It is hereby stipulated by and between the parties that the
199 court may settle the within transcript of testimony as the settled case in the above-entitled action, exhibits to be attached.

Dated this 21st day of May, A. D. 1897.

J. A. LOVELY AND
J. F. GEORGE,
Plaintiff's Attorneys.
McDONALD & BARNARD AND
T. H. GILL,
Defendants' Attorneys.

STATE OF MINNESOTA, }
County of Ramsey. }

District Court, 2nd Judicial District.

JOHN SMITHSON, Plaintiff,
vs.
H. F. WHITCOMB and H. MORRIS, Receivers of Wisconsin Central Railway Company, and Chicago, Great Western Railway Company, Defendants.

To John A. Lovely and J. F. George, attorneys for said plaintiff:

Notice is hereby given that the defendants, H. F. Whitcomb and Howard Morris, receivers of the Wisconsin Central Railway Company, defendants in the above-entitled action, will move for an order vacating and setting aside the verdict in the above-entitled action
on the following grounds:
200 First. That the court has no jurisdiction over the defendants in this action and that the trial and verdict before said court is contrary to law.

Second. Errors in law occurring at the trial and excepted to by the defendants.

Third. You are further notified that said motion will be made at a special term of the above-named court to be held at the court-house in the city of St. Paul, county of Ramsey and State of Minnesota on Saturday, the 5th day of June, A. D. 1897, at ten o'clock a. m. or as soon thereafter as counsel can be heard; that said motion will be made upon the files and records in said cause and upon the settled case therein and the exhibits used upon said trial.

Dated this 28th day of May, A. D. 1897.

McDONALD & BARNARD AND
T. H. GILL,
Attorneys for Defendants, Receivers,
616 N. Y. Life Bldg., St. Paul, Minn.

201 STATE OF MINNESOTA, }
County of Ramsey. }

District Court, Second Judicial District.

JOHN SMITHSON, Plaintiff,
vs.
H. F. WHITCOMB and HOWARD MORRIS, Receivers of the Wisconsin Central Railway Company, and Chicago, Great Western Railway Company, Defendants.

It is hereby stipulated by and between the parties that the clerk of the district court of Ramsey county may enter a stay of all proceedings and of entry of judgment in the above-entitled cause until and including the 20th day of June, A. D. 1897, upon the filing of this stipulation.

J. F. GEORGE,
Attorney for Plaintiff.
McDONALD & BARNARD,
Attorneys for Defendants.

STATE OF MINNESOTA, }
County of Ramsey. }

District Court, 2nd Judicial District.

JOHN SMITHSON, Plaintiff,
vs.
H. F. WHITCOMB and HOWARD MORRIS, Receivers of Wisconsin Central Railway Company, and Chicago, Great Western Railway Company, Defendants.

202 Upon reading and filing the annexed stipulation, it is ordered that all proceedings in said action shall be, and the same are hereby, stayed until and including the 20th day of June, 1897.

Dated June 1st, 1897.

JOHN W. WILLIS,
District Judge.

STATE OF MINNESOTA, }
County of Ramsey. }

District Court, 2nd Judicial District.

JOHN SMITHSON, Plaintiff,
vs.
THE GREAT WESTERN RAILWAY CO. and H. F. WHITCOMB and Howard Morris, Receivers of the Wisconsin Central Company, Defendants.

The plaintiff and defendants, receivers, in the above-entitled action, being in court by their attorneys, and it having been consented by the said parties that the order settling the case therein be amended, it is hereby—

Ordered, that the pleadings in said case, consisting of the complaint, answer and reply, together with the summons, also the petition for removal, bond, order of removal and the answer to the petition of removal, and order of the Federal court remanding said case, be incorporated in said bill of exceptions; and it is also—

203 Ordered, that the stipulation between plaintiff and defendants' attorneys for the receivers in said action be made a part of said records; and it is further—

Ordered, that it be considered a part of said record at the October term or terms referred to in said stipulation, and all subsequent terms of court said action was continued by consent of parties thereto until the term of court at which the cause was tried. The amended petition for removal on the part of the receivers at the close of plaintiff's case shall be included in the bill of exceptions.

Dated at St. Paul, June 12th, 1897.

JOHN W. WILLIS,
District Judge.

Notice of Appeal.

STATE OF MINNESOTA, }
County of Ramsey. }

District Court, 2nd Judicial District.

JOHN SMITHSON, Plaintiff,
vs.
CHICAGO, GREAT WESTERN RAILWAY COMPANY and H. F. WHITCOMB and Howard Morris, Receivers of the Wisconsin Central Company, Defendants.

204 To John A. Lovely and J. F. George, attorneys for plaintiff, and E. G. Rogers, clerk of the district court of Ramsey county, Minnesota:

Please take notice that the above-named defendants, H. F. Whitcomb and Howard Morris, receivers of the Wisconsin Central Company, appeal to the supreme court of the State of Minnesota, from

the judgment of said district court entered in the above-entitled cause on the 31st day of July, A. D. 1897, and from the whole thereof.

Dated this 14th day of August, 1897.

McDONALD & BARNARD AND
T. H. GILL,
Attorneys for Defendants, Receivers,
616 *N. Y. Life Ins. Bldg., St. Paul, Minn.*

Endorsed: Due service of the within by a true copy is hereby admitted, at St. Paul, Minn., on this 14th day of August, 1897. J. F. George, attorney for plaintiff. Due service of the within by a true copy is hereby admitted at St. Paul, Minn., on this 14th day of August, 1897. Edward G. Rogers, clerk of the district court. Filed Aug. 14, 1897. Edward G. Rogers, clerk, by G. A. Limberg, deputy.

205 *Undertaking on Appeal.*

STATE OF MINNESOTA, } ss.
County of Ramsey. }

District Court, Second Judicial District.

JOHN SMITHSON, Plaintiff,
vs.
THE CHICAGO, GREAT WESTERN RAILWAY COMPANY and H. F. Whitcomb and Howard Morris, Receivers of the Wisconsin Central Company, Defendants.

Whereas the defendants H. F. Whitcomb and Howard Morris, receivers of the Wisconsin Central Company, in the above-entitled action appeal to the supreme court of the State of Minnesota from the judgment made and entered herein on the 31st day of July, 1897:

Now, therefore, we, John C. Corcoran and John Barnard, do undertake, promise, and agree to and with said John Smithson that said H. F. Whitcomb & Howard Morris, receivers of the Wisconsin Central Company, shall pay all costs and charges that may be awarded against them on such appeal:

Conditioned, however, that our liability hereunder shall not exceed the sum of two hundred and fifty ($250.00) dollars.

Dated this 31st day of August, 1897.

JOHN C. CORCORAN. [SEAL.]
JOHN BARNARD. [SEAL.]

Signed, sealed, and delivered in presence of—
L. D. BARNARD.
L. FAHEY.

STATE OF MINNESOTA, } ss.:
County of Ramsey, }

Be it known that on this 29th day of September, A. D. 1897, before me personally appeared John C. Corcoran and John Barnard, to me known to be the same persons described in and who executed

the foregoing undertaking, and each for himself acknowledged the same to be his own free act and deed.

[NOTARIAL SEAL.] L. D. BARNARD,
Notary Public, Ramsey County, Minn.

206 [Endorsed:] District court, county of Ramsey. John Smithson *vs.* H. F. Whitcomb *et al.*, as receivers, etc. Filed Sep. 29, 1897. Edward G. Rogers, clerk, by —— ——, deputy. Undertaking on appeal. The within undertaking and the sureties therein are hereby approved this 29th day of September, 1897. William Louis Kelly, district judge. McDonald and Barnard, def'ts' attorneys.

STATE OF MINNESOTA, *County of Ramsey,* } *ss.:*

John C. Corcoran and John Barnard, the persons named in and who executed the foregoing undertaking, being first duly sworn, doth, each for himself, depose and say that he is a resident and freeholder of the State of Minnesota and worth the amount of two hundred and fifty dollars above his debts and liabilities and exclusive of his property exempt from execution.

JOHN C. CORCORAN.
JOHN BARNARD.

Subscribed and sworn to before me this 29th day of Sept., A. D. 1897.

L. D. BARNARD,
[NOTARIAL SEAL.] *Notary Public, Ramsey County, Minnesota.*

207 (Supreme Court of Minnesota, Jan. 14, 1898.)

SMITHSON
v.
CHICAGO G. W. R'Y CO. ET AL.

Removal of causes—Waiver of right—Master and servant—Railroads—Negligence—Evidence—Rules—Province of jury—Harmless error.

1. When a circuit court of the United States decides that a cause has been improperly removed from a State court, and orders that such cause be remanded, the decision is final, under the Federal statute. No appeal or writ of error from such decision is allowed.
2. A defendant entitled to have his case removed from a State to a Federal court, or from the latter to the former, there being no question of jurisdiction over the subject-matter or over the parties, may waive his rights to insist upon a removal by his acts or omissions.
3. It is held that a stipulation entered into between counsel for appellant and respondent, while the former was in default for want of answer, settled the controversy as to appellant's right to have the case tried in the Federal court, and that thereby the place of trial was fixed in the State court.

4. The fact that certain rules promulgated and put in force for the guidance and government of railway employés, while operating locomotives, have been violated, may be shown upon the trial of an action for personal injuries said to have been caused by such violation, and the fact may be considered as evidence tending to establish negligence of the defendant.
5. But such rules do not stand on the same footing as statutes or municipal ordinances, in the nature of police regulations, for the protection of the public or some particular class of persons. The law, statutory or municipal, if valid, fixes the legal standard of duty to those for whose protection it was designed, while private rules may require either more or less than is required by law. Compliance with the latter would not necessarily constitute reasonable care, nor would the violation thereof necessarily constitute negligence.
6. On the trial of an action for personal injuries alleged to have been received by plaintiff while employed as a locomotive fireman by one company, through the negligence of the men in charge of the locomotive of another company, and in a collision, both companies using the same tracks, owned by a third company, the rules promulgated by the latter, for the government of all trainmen using the tracks, were put in evidence, together with proof that one or more of these rules were being violated by defendants' (appellants') employés when the collision occurred. The court charged that, if the jury should find from the evidence that the rules were being violated when the collision took place, they might consider defendants' negligence as established. *Held*, that this was error.
7. But such an instruction is held to have been error without prejudice for the reason that, upon the undisputed evidence as to the facts and circumstances surrounding the collision, the trial court would have been justified in charging the jury that defendants' negligence was established as a matter of law.

(Syllabus by the court.)

Appeal from district court, Ramsey county—John W. Willis, judge.

Action by John Smithson against The Chicago Great Western Railway Company and H. F. Whitcomb and Howard Morris, as receivers of the Wisconsin Central Railway Company, to recover for personal injuries; judgment in favor of plaintiff and against the receivers, who appeal; affirmed.

208 McDonald & Barnard and T. H. Gill, for appellants. John A. Lovely and J. F. George, for respondent.

COLLINS, *J.*:

Action for personal injuries received by plaintiff while he was serving defendant Chicago Great Western Railway Company as a locomotive fireman, and in a collision between the locomotive on

which plaintiff was at work and another operated by defendants Whitcomb and Morris, as receivers, under appointment by the United States circuit court, of the Wisconsin Central Railway Company. It was alleged in the complaint that both of these defendants operated locomotives and trains over about four miles of track owned by the Chicago & Northern Pacific Railway Company, in the city of Chicago, and it was on this piece of track that the collision occurred. The negligence alleged on the part of the receivers was in allowing their locomotive to stop and remain standing in the night-time at a certain place on their track, and when there was imminent danger of a collision, without giving proper or any signals of having so stopped; while the negligence on the part of the Chicago Great Western Company was alleged to be an omission and failure on its part to adopt or establish proper or any rules for the giving of warning signals by its own or other locomotives or trains while being operated on said track.

1. The first question in the case grows out of certain steps taken by the receivers in an effort to remove the cause to the Federal courts. To this end, and in due time, the receivers filed a petition for removal and a bond in the district court for Ramsey county, in which court the action had been instituted. The other defendant did not join in this petition, but duly answered in the action. An order of the district court removing the cause as petitioned was made, and a few days afterwards, upon the hearing of an order to show cause, the case was remanded by the Federal court to the Ramsey county district court upon the ground that it had been improperly removed from the latter, the formal order remanding being filed in February, 1896. The receivers were then in default for want of answer, and on the 4th of June stipulated in writing with plaintiff's attorneys, in consideration of being relieved from this default, and in consideration of their being allowed to answer in the action, that the issues so made should be tried in said district court at the June term, 1896, and that in case of a final judgment against them they would not oppose the allowance of such judgment by the master in chancery. An answer was served in accordance with this stipulation, to which plaintiff replied, and thereafter the cause was continued by consent of counsel for plaintiff and for the receivers until the April term, 1897. It then came on for trial as against both defendants, but counsel for receivers, in disregard of the remanding order of the Federal court and of their own stipulation, attempted to interpose an amended answer, alleging, among other things, a want of jurisdiction on the part of the district court, on the ground that the cause had theretofore been duly removed to and was then pending in the circuit court for the United States, and not elsewhere; and also objected to the introduction of any evidence, upon the ground that the case was still pending in the United States circuit court. The district court very properly refused to permit the amendment, and plaintiff submitted his proofs to a jury. Defendants offered no testimony. The court then directed the jury to return a verdict in favor of the Chicago Great Western Company upon the ground that plaintiff had failed to make out a case against it;

whereupon counsel for receivers filed another removal petition and bond, demanding that, as the Chicago Great Western Company was no longer a defendant, the case was then one for removal. The court below refused to consider the petition, charged the jury, and, in due season, separate verdicts were returned,—one in favor of plaintiff, and against the receivers, for substantial damages; the other, of no cause of action as to the railway company.

There are two sufficient reasons, at least, for holding that the district court did not err in its rulings which finally resulted in submitting the merits of plaintiff's case against the receivers to the jury: First. The order of the Federal court was and is final; for it is expressly provided by 25 Stat., 433, that whenever a circuit court shall decide that a cause has been improperly removed to it from a State court, and shall order the same to be remanded, such remand shall be immediately carried into execution, and no appeal or writ of error from the decision of the circuit court shall be allowed. And the Supreme Court of the United States has frequently had occasion to refer to this statute, and to declare that the order of the Federal court remanding the case is absolutely final. Nor do we find, as claimed by counsel for defendant receivers, that this rule has in any way been qualified or abridged in Railway Co. *v.* Fitzgerald, 160 U. S., 556; 16 Sup. Ct., 389. And this court has held that when a Federal court has acted upon the question, and has remanded a case to a State court, as having been improperly removed,—the State court having jurisdiction of the subject-matter and of the parties,—the latter court cannot review the ruling. Tilley *v.* Cobb, 56 Minn., 295; 57 N. W., 799. Second. The receivers, in consideration of being permitted to answer the complaint after having been in default for several months, expressly agreed to try the case in the State court. Through this agreement they secured a substantial right,—the right to answer. If prior to that time there had been a real controversy over the receivers' right to have the cause tried in the Federal court, it was then and there settled by a formal stipulation, deliberately entered into by counsel, which they
209 must abide by, and which will be enforced by the courts, in the interest of fair dealing and professional good morals. It seems hardly necessary to conclude on this feature of the case by saying that a defendant who is entitled to have his case removed from a State to a Federal court, or from the latter to the former, there being no question of jurisdiction over the subject-matter or over the parties, may waive his rights to insist upon a removal by his acts or omissions.

2. We have stated that the accident occurred upon the track of another company, in the city of Chicago. This company leased the use of its two tracks, one for outgoing the other for incoming trains, to these defendants, from what was known as the "Robey Street round-house" to the vicinity of Forest Home. Both defendants used this round-house, and plaintiff worked upon a freight locomotive which usually left the round-house about 8.20 p. m., and, taking the train crew, ran out to the yard, about three miles, where it coupled on to its train and proceeded westerly. A freight locomo-

tive, operated by defendant receivers, usually left the round-house 15 or 20 minutes later, and, running over the same track, took up its train at the receiver's freight yard, in the same vicinity. On the night in question the locomotive on which plaintiff worked was delayed in starting because of the non-appearance of a brakeman, and, at the request of the engineer, who was employed by the receivers, his locomotive was given the right of way. After it had been gone about 20 minutes the locomotive on which plaintiff worked started. When it reached a point near Forty-eighth street it ran into the other locomotive, and plaintiff received a severe injury. It appears from the evidence that, when the receivers' locomotive reached a point on the main track about opposite the caboose of the train it was to haul out, which was upon a paralleling yard track, it was stopped, and there remained long enough for the other locomotive to run into it. The sole purpose of stopping at this point seems to have been to afford some of the trainmen an opportunity to transfer a large dog from the cab of the locomotive, where it had been riding, to the caboose of the train. There was one red light upon the rear of the tender of the receivers' locomotive, but this was not seen by the men on the other locomotive until it was too late to avert the collision. While stopping, the men operating the locomotive in advance had taken no precautions whatsoever towards protecting themselves from collision. It also appeared from the evidence that the railway company owning these tracks had promulgated and put in force a number of rules for the government of all trainmen while using or occupying these tracks. Several of these rules were applicable to a locomotive or train stopped upon the main track outside of station grounds, and No. 127 was in these words: "Inasmuch as trains may be expected at any time to be entering the yards or sidings, or to stop at any point, without reference to schedules, and as switches are constantly in use, engineers or conductors running trains or engines between Chicago and Central avenue must at all times so control their trains or engines as to be able to stop within the range within which an obstruction of the track and the position of switches can be plainly seen; but nothing in this will be held as an excuse for the failure to display proper signals when trains or engines are held on the main track, and men in charge of trains or engines, when in danger of being overtaken by another train, must protect themselves by flags, lamps, fusees, or torpedoes, promptly, to avoid all possibility of being run into." It will be remembered that, as against the defendant receivers, the negligence relied upon by plaintiff in his complaint arose from the failure of those in charge of their locomotive to guard against collision, while stopping, by putting out or giving proper signals for night service; and it was the evidence of this omission or failure to protect the locomotive while standing that was depended upon by plaintiff's counsel as warranting a verdict against the receivers. So the charge of the court upon this branch of the evidence was quite full and complete, reference being made to the rules we have mentioned. Among other things, the court charged as follows: "The negligence which the plaintiff claims to have existed is said to have consisted in vio-

lating the rules which have been offered in evidence. * * * The violation of these rules, when attended by a wrong, constitutes the fact of admission of negligence on the part of those who violate them. The rules are designed for a wise and beneficent purpose, to transact the business of the railway efficiently, and to protect its employés and passengers, carried by and over its lines, against personal injury. The violation of a definite, well-understood rule on the part of these defendants may be considered by the jury as evidence of negligence, and from the violation of these rules—well understood by the persons who violated them—(if the jury should find from the testimony that such was the fact that there was this violation) *the jury may consider negligence on the part of the defendants established.*" And to that part of this language which we have italicized counsel for the defendant receivers took an exception, and now assign it as error. The instruction was clearly wrong. Here were private rules adopted for the government of trains and trainmen while using these tracks. They did not stand on the same footing as statutes or municipal ordinances in the nature of police regulations for the protection of the public or some particular class of persons. The law, statutory or municipal, if valid, fixes the legal standard of duty to those for whose protection it is designed, while private rules may require either more or less than is required by law. So, compliance with private rules would not necessarily constitute reasonable care, nor a violation thereof necessarily
210 constitute negligence. By this instruction it was declared as a matter of law that, if the employés in charge of this locomotive failed to obey the rule we have quoted by neglecting to promptly put out flags, lamps, fusees, or torpedoes, if there was danger of being overtaken, the receivers' negligence was established. The charge really went further than this, for upon the trial it was claimed by plaintiff's counsel that other rules, introduced in evidence and equally as definite and well understood, were also violated when the locomotive was allowed to stand upon the main track. This instruction, in the form in which it was given, invaded the province of the jury and determined facts. The employés' disregard of the rule, or their failure to give and use such of the signals as would have served as notice or warning of danger in the darkness which prevailed at that time of night, might have been considered by the jury as evidence of negligence, but proof of a failure to observe the rules could not, of itself, establish defendants' negligence at the time of the collision. By this part of the charge the rules adopted for the government of all employés using these tracks were held to be a test for defendants' negligence, and to be the legal standard by which the fact of such negligence should be determined. But, in this case, the error was without prejudice, because, on the undisputed evidence, the court would have been warranted in instructing the jury, as a matter of law, that those in charge of defendants' engine were guilty of negligence in failing to give warning to others when they stopped upon the track. They were on a main track over which more than 100 trains passed each day, part of these on time-cards, but many that were not. Trains or engines could be expected

almost any moment. Adjacent to these main tracks, for there were two, were parallel tracks used for freight trains, with numerous "cross-overs" to the main tracks, which were in constant use. It was after dark, and those in charge knew that a belated engine—the one on which plaintiff was fireman—might arrive any moment from the round-house, less than three miles back, and that it would undoubtedly be running rapidly, in order to make up for its lost time. It does not appear how long defendants' locomotive had been halted at this unusual place when the collision occurred, but it was shown that the belated locomotive did not start from the round-house until 15 or 20 minutes after the other had departed, and it also appeared that immediately after the accident the dog was found tied in the caboose upon one of the yard tracks. Evidently the halt had been long enough to transfer the dog from the engine to the caboose. The only warning given was that afforded by the single red light upon the rear of the tender, and that would not indicate whether the locomotive was under motion or standing still. With an unobstructed view of the track to the rear for half a mile, and a perfect opportunity to see the approaching headlight upon the other engine for that distance, at least, defendants' employés did not even take the precaution to guard against a rear-end collision by swinging a lantern,—a thing that could have been done immediately upon the stopping of their locomotive. They put out no signal and gave no warning of their dangerous act, and upon the trial offered no evidence to explain or rebut that produced by plaintiff. We are justified in holding that the proofs conclusively established defendants' negligence, and that the court below would have been warranted in so charging as a matter of law and irrespective of the rules. Therefore the instruction in question was error without prejudice.

There are but one or two points made by counsel, in addition to those already discussed, which need consideration. If, as claimed, the engineer in charge of the locomotive on which plaintiff was firing ran it negligently,—that is, too rapidly,—and in disregard of some of the rules we have mentioned, his negligent conduct could not be imputed to plaintiff. The immediate proximate cause of plaintiff's injuries was the negligence of the men operating the head engine. Nor were the trainmen upon those two locomotives serving a common master, and therefore fellow-servants. Although running over a terminal track, under rules put in force by the owner of such track, a third party, these men owed the duty of obeying these rules to their respective masters, not to the third party. A disobedience of the rules was a violation of the duty due from a servant to the party who employed him, and none of these men were in the employ or under the control of the terminal company. We shall waste no time in discussing the contention of counsel for defendants that their clients cannot be held because the act producing the injury—stopping the engine to unload the dog—was wholly without the scope of the servant's authority. The judgment is affirmed.

211 STATE OF MINNESOTA:

Supreme Court, October Term, A. D. 1897.

JOHN SMITHSON, Respondent,
vs.
THE CHICAGO GREAT WESTERN R'Y CO. ET AL., Defendants; H. F. Whitcomb and Howard Morris, Receivers of the Wisconsin Central Company, Appellants. } No. 224.

Pursuant to an order of court, duly made and entered in this cause on the 27th day of January, A. D. 1898—

It is here and hereby determined and adjudged that the judgment of the court below herein appealed from, to wit, of the district court of the second judicial district, sitting within and for the county of Ramsey, be, and the same hereby is, in all things affirmed; and it is further determined and adjudged that the respondent above named do have and recover of said H. F. Whitcomb and Howard Morris, receivers of the Wisconsin Central Company, appellants herein, the sum and amount of fifty-nine and $\frac{50}{100}$ dollars ($59.50), costs and disbursements in this cause in this court, and that said respondent have execution for the enforcement thereof.

Dated and signed this 27th day of January, 1898.

By the court:

[Seal of the Supreme Court, State of Minnesota.]

Attest: D. F. REESE, *Clerk.*

Statement for Judgment.

Costs allowed by statute	$25.00
Clerk's fees for making return	
Printer's fees	24.50
Clerk's fees, supreme court	10.00
Filing mandate	
Affidavits and acknowledgments	
Postage	
Copying returns for printer	
	$59.50

212 [Endorsed:] 10922. State of Minnesota, supreme court. Transcript of judgment. Filed January 27, A. D. 1898. D. F. Reese, clerk. —— ——, attorney for —— ——. Page No. 375, V Book.

STATE OF MINNESOTA, *ss*:

Supreme Court.

I, D. F. Reese, clerk of said supreme court, do hereby certify that the foregoing is a full and true copy of the entry of judgment in the cause therein entitled, as appears from the original remaining of record in my office; that I have carefully compared the within copy with said original, and that the same is a correct transcript therefrom.

Witness my hand and the seal of said supreme court, at the capitol, in the city of St. Paul, this 27th day of January, A. D. 1898.

D. F. REESE, *Clerk*.

213 STATE OF MINNESOTA:

Supreme Court, October Term, A. D. 1898.

JOHN SMITHSON, Respondent,
vs.
THE CHICAGO GREAT WESTERN R'Y CO. *et al.*, Defendants; H. F. Whitcomb and Howard Morris, Receivers, Appellants.

No. 224. Appeal from District Court, Second Judicial District, County of Ramsey.

This cause having been duly argued and submitted at the general October term of this court, A. D. 1898, upon the return to the appeal herein:

Now, after full and mature deliberation had thereon, it is here and hereby ordered that the judgment of the court below herein appealed from be, and the same hereby is, in all things affirmed, and that the respondent above named have judgment accordingly.

Entered January 27, A. D. 1898.

By the court:

[Seal of the Supreme Court, State of Minnesota.]

Attest: D. F. REESE, *Clerk*.

I hereby certify that the foregoing is a full and true copy of the original order for judgment entered in the above-entitled cause.

Attest: D. F. REESE, *Clerk*.

214 [Endorsed:] No. 10922. State of Minnesota, supreme court. Copy of order for judgment. Filed January 27, A. D. 1898. D. F. Reese, clerk. Entered on page 91, "M."

215 STATE OF MINNESOTA:

Supreme Court, General October Term, *A. D.* 1897.

FRIDAY MORNING, 9.30 O'CLOCK,
December 24, *A. D.* 1897.

Court convened pursuant to adjournment, all the justices being present.

JOHN SMITHSON, Respondent,
vs.
CHICAGO GREAT WESTERN R'Y CO. ET AL., Def'ts; H. F. Whitcomb and Howard Morris, Receivers of Wisconsin Central Company, Appellants.
} Cal. No., 224; Reg. No., 10922.

This cause came on to be heard this day upon the return to the appeal herein.

Thereupon the same was argued by counsel, submitted to the court for decision upon paper books and briefs, and taken under advisement.

A true record.

[Seal of the Supreme Court, State of Minnesota.]

Attest: D. F. REESE, *Clerk.*

The foregoing is a full and true copy of the minutes of argument in the above-entitled cause.

Attest: D. F. REESE, *Clerk.*

216 [Endorsed:] 10922. State of Minnesota, supreme court. Copy of minutes of argument. Filed January 26, A. D. 1898. D. F. Reese, clerk.

217 [Endorsed:] No. 10922. State of Minnesota, supreme court. John Smithson, respondent, against The Chicago Great Western R'y Co. *et al.*, appellants. Judgment-roll. Filed January 26, 1898. D. F. Reese, clerk.

218 State of Minnesota, Supreme Court.

STATE OF MINNESOTA, *Office of Clerk of Supreme Court,* } ss:

I, Darius F. Reese, clerk of the supreme court, State of Minnesota, do hereby certify and return to the Supreme Court of the United States that the foregoing and annexed transcript of record is a full and complete transcript of the record, judgment, judgment-roll, and all of the proceedings had in the said supreme court of the State of Minnesota in the case between John Smithson, respondent, *vs.* The Chicago Great Western Railway Company and H. F. Whitcomb and Howard Morris, receivers of the Wisconsin Central Company,

defendants, and H. F. Whitcomb and Howard Morris, receivers of the Wisconsin Central Company, appellants, including the opinion of the said supreme court therein, as appears from the original files and records.

And I do further certify and return that I have annexed to said transcript and included therewith and that the foregoing are copies of the petition for writ of error, with allowance of same, and of the assignments of error and of the bond, as the same remain on file and of record in said supreme court of the State of Minnesota, and are the original writ of error from the Supreme Court of the United States and the original citation issued thereon, with proof of service thereof, and that the foregoing constitutes a true, full, and complete return to said writ of error.

Seal of the Supreme Court, State of Minnesota.

In witness whereof I have hereunto set my hand and the seal of said supreme court of the State of Minnesota, at the capitol, at Saint Paul, Minnesota, this 5th day of October, A. D. 1898.

D. F. REESE,
Clerk of the Supreme Court, Minnesota,
By J. L. HELM,
Deputy Clerk.

[Endorsed:] Supreme Court of the United States. H. F. Whitcomb *et al.*, receivers, etc., pl'ffs in error, *vs.* John Smithson, def't in error. Return.

Endorsed on cover: Case No. 17,022. Minnesota supreme court. Term No., 150. Henry F. Whitcomb and Howard Morris, as receivers of the Wisconsin Central Company, plaintiffs in error, *vs.* John A. Smithson. Filed October 13th, 1898.

No. 150.

Brief of Morris for P. E.

BRIEF FOR PLAINTIFFS IN ERROR.

Supreme Court of the United States,

OCTOBER TERM, A. D. 1899.
No. 150.

HENRY F. WHITCOMB and HOWARD MORRIS,
as Receivers of the Wisconsin Central Company,
Plaintiffs in Error,

vs.

JOHN A. SMITHSON,
Defendant in Error.

In Error to the Supreme Court of the State of Minnesota.

HOWARD MORRIS,
THOMAS H. GILL,
Counsel.

EVENING WISCONSIN CO., PRINTERS, MILWAUKEE.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, A. D. 1899.

NO. 150.

HENRY F. WHITCOMB AND HOWARD MORRIS, AS RECEIVERS OF THE WISCONSIN CENTRAL COMPANY,

Plaintiffs in Error,

vs.

JOHN A. SMITHSON,

Defendant in Error.

BRIEF FOR PLAINTIFFS IN ERROR.

STATEMENT OF THE CASE.

This action was brought in the District Court for Ramsey County, State of Minnesota, October 2d, 1895, to recover from the plaintiffs in error and the Chicago Great Western Railway Company, a corporation under the laws of the State of Illinois, as defendants, damages for injuries to the person of said Smithson. (Record, p. 9.)

At the time of the injury said Smithson was a servant employed as locomotive fireman upon the line of the Chicago Great Western Railway Company running westerly from the City of Chicago, Illinois. (Record, p. 11.) The Receivers and the Chicago Great Western Railway Company used the same tracks in reaching the terminal station in Chicago, and the engine on which Smithson was engaged ran into an engine manned by employes of the Receivers, stopped by them, and standing on the

main outgoing track in the City of Chicago, on the night of March 7th, 1894. (Record, p. 12.)

Within the time fixed by law the Receivers filed a proper petition and bond for the removal of the action into the United States Circuit Court for the District of Minnesota, basing the right claimed upon the fact of the appointment of the Receivers by the United States Circuit Courts of Wisconsin and Minnesota, upon the diverse citizenship of the parties, that no cause of action existed in fact or was stated against the defendant the Chicago Great Western Railway Company, and that said Railway Company was joined as a defendant collusively for the purpose only of preventing a removal of said cause, and that the causes of action against the defendants, if any, were separable and distinct. (Record, pp. 16-18.)

The plaintiff filed a motion to remand from said United States Circuit Court based upon an answer so-called denying collusively joining defendants to prevent removal, and the action was remanded. (Record, pp. 20-22-24.) The defendant Receivers answered under stipulation and went to trial in the State Court, preserving objections to the jurisdiction of that Court. (Record, p. 26.)

At the close of the plaintiff's evidence and upon motion, a verdict was directed as to the defendant the Chicago Great Western Railway Company. (Record, p. 35.) Thereupon the Receivers immediately filed a new petition and bond for removal based upon their right as officers of a Federal Court and as non-resident defendants. (Record, pp. 30-34.) The right to the removal was denied, and the trial proceeding, verdict and judgment followed for the plaintiff. (Record, p. 117.) An appeal to the Supreme Court of Minnesota resulted in an affirmance. (Record, p. 130.)

The writ of error herein is prosecuted to review the judgment of the Supreme Court of the State of Minnesota denying the right of removal.

ASSIGNMENT OF ERRORS.

1st. The State Court erred in assuming jurisdiction of the parties and subject-matter of this action upon remand from the

United States Circuit Court for the District of Minnesota, Third Division.

2nd. The State Court erred in denying the motion of the defendant Receivers, the plaintiffs in error here, for permission to file an amended answer therein, pleading to the jurisdiction of said Court.

3rd. The State Court erred in overruling the objections of the defendant Receivers, plaintiffs in error here, to the jurisdiction of said Court to hear, try and determine this action.

4th. The State Court erred in denying defendant Receivers' motion upon their proper petition and bond for the removal of this action to the United States Circuit Court for the District of Minnesota, Third Division, presented immediately following the dismissal of the cause of action as against the Chicago Great Western Railway Company at the close of the plaintiff's case.

5th. Said State Court did err in exercising jurisdiction in said cause and in trying and determining the same and rendering judgment therein, in that it denied to the defendants therein, the plaintiffs in error here, the right, privilege and immunity specially set up therein, under the statute and authority of the United States, of their removal of and their right to remove said cause from said State Court into said Circuit Court of the United States.

SYNOPSIS OF ARGUMENT.

The State Court erred in denying the application of the Receivers for removal into the Circuit Court of the United States for the District of Minnesota, upon the petition and bond presented at the close of the plaintiff's evidence and after a verdict had been directed for the defendant the Chicago Great Western Railway Company, and in thereafter proceeding to verdict and judgment in said cause.

The original petition of the Receivers showed upon its face rights of removal based upon two jurisdictional grounds; first, diverse citizenship and separable controversy, and, second, that the action was against federal receivers for alleged negligence growing out of their operation of the property, and that no

cause of action was stated against the co-defendant who was joined merely to prevent removal.

Upon both grounds, or either, the removal was a matter of right if correctly applied.

As to the first:

Ayres *vs.* Wiswall, 112 U. S., 187.
Beuttel *vs.* C., M. & St. P. R'y Co., 26 Fed. Rep., 50.
N. Y. Construction Co. *vs.* Simon, 53 Fed., 1.
Barney *vs.* Lathan, 103 U. S., 205.
Bacon *vs.* Rives, 106 U. S., 99.
Fergason *vs.* R'y Co., 63 Fed., 177.
Over *vs.* Lake Erie & W. R. Co. et al., 63 Fed., 34.
Warax *vs.* R'y Co., 72 Fed., 637.
Hukill *vs.* R'y Co., 72 Fed., 745.
Hartshorn *vs.* R'y Co., 77 Fed., 9.
17 A. & E. Encl., 602-604.

As to the second:

Landers *vs.* Felton, 73 Fed., 311.
Lund *vs.* C., R. I. & P. R'y Co., 78 Fed., 385.
Carpenter *vs.* N. P. R. Co., 75 Fed., 850.
Lanning *vs.* Osborne, 79 Fed., 657.
McNulta *vs.* Lochridge, 141 U. S., 327-331.
Jewett *vs.* Whitcomb et al., 69 Fed., 417.
Bock *vs.* Perkins, 139 U. S., 628.
Wood *vs.* Drake, 70 Fed., 881.
Rouse *vs.* Hornsby, 161 U. S., 588.
Gableman *vs.* P. D. & E. R. Co. et al., 82 Fed., 790.

The cause was remanded by the Circuit Court on the theory that the complaint stated a joint cause of action on the authority of the case of

Thompson *vs.* R. R. Co., 60 Fed. Rep., 773.

The order of remand was final as to this case upon the first petition.

Mo. Pac. R'y Co. *vs.* Fitzgerald, 160 U. S., 556.
Powers *vs.* R. R. Co., 169 U. S., 92.

When, however, the direction of a verdict at the close of the plaintiff's case was made in favor of the co-defendant Railway Company, the cause then became in fact removable by the Receivers, and their application to remove should have been granted.

Huskins *vs.* R. R. Co., 37 Fed. Rep., 504.
Evans *vs.* Dillingham, 43 Fed. Rep., 177.
Yarde *vs.* B. & O. R. R. Co., 57 Fed. Rep., 913.
Mattoon *vs.* Reynolds, 62 Fed. Rep., 417.
Cookerly *vs.* R'y Co., 70 Fed. Rep., 277.
Yulee *vs.* Vose, 99 U. S., 539.
Powers *vs.* R. R. Co., 65 Fed. Rep., 129.
Hukill *vs.* R. R. Co., 65 Fed. Rep., 138.
Arrowsmith *vs.* R. R. Co., 57 Fed. Rep., 165.
Arapahoe County *vs.* K. P. R. Co., 4 Dillon, 277.
Powers *vs.* C. & O. R. Co., 169 U. S., 92.
Bailey *vs.* Mosher, 95 Fed. Rep., 223.

The cause thus being in fact removable, the refusal of the trial Court to transfer the cause was a denial of a right set up under the laws of the United States, and the holding of the State Court is reviewable here.

Mo. Pac. R'y Co. *vs.* Fitzgerald, 160 U. S., 556.

ARGUMENT.

The Receivers seasonably sought to remove this case into the United States Court, deeming it removable. The co-defendant, though also a non-resident of Minnesota, did not join in the proceedings, and the cause was remanded upon the plaintiff's motion. The determination of lack of jurisdiction in the Federal Court turned upon the doctrine that the plaintiff's statement of a joint action in tort against the defendants, if joint in fact as well as several, controls upon the question of separable controversy. The decision distinctly relied upon that authority.

Thompson *vs.* R'y Co. et al., 60 Fed., 773.

But the removal was actually based not only upon diverse citizenship and a separable controversy, but also upon the right

arising when the construction of an act of Congress might be brought into question. The Receivers were acting under appointment of a Federal Court.

T. & P. R'y Co. *vs.* Cox, 145 U. S., 593.
Landers *vs.* Felton, 73 Fed., 311.

However, the remanding order was probably final as far as the first petition and the record at that time was concerned.

Mo. Pac. R'y Co. *vs.* Fitzgerald, 160 U. S., 556.
Powers *vs.* C. & O. R'y Co., 169 U. S., 92.

The defendant Receivers proceeded thereafter upon the theory that the remanding order, based as it was upon, and meeting in fact, but one of the rights urged for removal, did not restore jurisdiction of the cause to the State Court, and objections were made and exceptions reserved upon this point.

They were forced to trial in the State Court, and all parties being represented proceeded to the close of the evidence offered by the plaintiff to establish his right to recover. The co-defendant Railway Company secured a verdict by direction of the Court, and the Receivers immediately and formally applied for a removal, which was denied, verdict and judgment against them following.

The original petition for removal had set up that the defendant, the Chicago Great Western Railway Company, was not a real party to the action, but had been joined as a defendant with the Receivers for the sole purpose of preventing the removal of this case to the Federal Court.

At every step of the trial the Receivers urged upon the attention of the trial Court this proposition, and it became evident, as will appear from the reading of the testimony, that the trial was conducted upon some understanding or agreement between the plaintiff and the defendant, the Chicago Great Western Railway Company, pursuant to the original idea that it should be made a party only for the purposes stated.

The ground of negligence relied upon against the Chicago Great Western Railway Company was its failure to establish proper rules under which to conduct the business upon the ter-

minal tracks which would have prevented the injury to the plaintiff, but we search in vain for one single word of testimony produced upon the direct examination of the plaintiff himself, or any of his witnesses, tending to establish a particle of right to recover against that company upon the ground stated. The plaintiff's counsel was singularly silent with regard to any evidence whatsoever to sustain his alleged cause of action against that company. The entire evidence upon that subject was voluntarily elicited by the counsel for the Great Western Company. In other words, without any attempt of any kind on the part of the plaintiff to prove his alleged cause of action, the defendant thoughtfully provided against recovery. If the Great Western Company's counsel had not been present, not a syllable would have been offered in the evidence in any wise tending to connect the Great Western Company with the injury. It was intended that it should not. Not even a feeble effort was made to resist the motion of the Great Western Company's counsel for a directed verdict at the close of the plaintiff's case, and, indeed, none could be, for there had been absolutely no showing made upon which the Great Western could have been held, and the State District Judge, in granting the directed verdict, plainly stated that ample rules had been established, which fact, of course, it would be ridiculous to assert the plaintiff and his counsel did not know.

It will not be disputed that there is ample authority to establish the proposition that where an action is brought against two defendants, one of whom is entitled to remove, and the plaintiff voluntarily dismisses as to the resident defendant, whose presence in the case has prevented a removal, even though it be long after the time within which removal could originally have been had, the changed conditions justify, and, indeed, require the Court to grant the application for removal.

And it is likewise established that where for the purpose of defeating removal, the plaintiff brings an action for an amount less than the jurisdictional sum required by the United States statutes, and afterward, even at the close of the testimony and based upon the evidence adduced, the plaintiff applies to in-

crease the *ad damnum* above the jurisdictional amount and such application is allowed, the defendant may then remove.

In the case at bar, counsel for the plaintiff carried the litigation, knowing it to be within their control, one step further, and instead of dismissing after the period for removal had expired or when called for trial permitted the matter to run until the close of the testimony, thus hoping to establish by greater appearance of good faith, that the joinder of defendants had not been collusive.

In Huskins *vs.* Cincinnati, N. O. & T. P. Ry. Co., 37 Fed., 504, an action was brought against the defendant, a non-resident, in which damages were laid at the sum of $2,000 and upon which removal could not be had. After issue joined, the plaintiff procured an amendment increasing the *ad damnum* clause to $10,000, and afterward, the time for removing under the original bond having expired, the defendant filed a petition and bond for removal upon the increased claim for damages.

The Court say:

"In general phrase and in most respects, the amendment increasing the damages did not create a new suit, but so far as the jurisdiction of this Court is concerned it was new, and a liberal interpretation will be allowed to prevent the flagrant and intentional defeat of its jurisdiction. 'If the defendant have a right to the removal, he cannot be deprived of it by the allowance by the State Court of an amendment reducing the sum claimed after the right of removal is complete.' Speer, Rem. Causes, 81; Kanouse *vs.* Martin, 15 How., 198. This being true, is not the converse of the proposition true; that is, that a person not entitled to a removal who becomes entitled to it, so far as the jurisdictional amount is concerned, by reason of an amendment allowed by the State Court after the time had elapsed within which his removal of the suit might have been made, shall not be deprived of his right to remove the suit? The reasons why the removal of the cause should not be defeated in one case apply with equal cogency to the other. Had the defendant filed its petition and bond for removal the moment after the amendment was made increasing the damages claimed, his attitude in the case would have been in nowise changed from that which it occupies."

In Evans *et al. vs.* Dillingham *et al.*, 43 Fed., 177, the Court says:

"There is no question in my mind that where an amended petition makes a substantially different suit from the original petition, the limitation as to the time within which the petition for removal can be presented should relate to the new pleading of the plaintiff. As an illustration of the propriety and necessity of so holding, take the case where a party sues in the State Court alleging the cause of controversy to be of less value or not of greater value than $2,000, and after the return term and after the defendant has answered, the plaintiff files an amended petition setting up the same cause of action but claiming damages in a sum exceeding $2,000, can it be doubted that, if the state of the parties or the cause of action be such as to have given the right to remove had the amount in controversy been sufficient to give this Court jurisdiction, the defendant would not be denied his right to remove because the time within which he was required to answer the original petition had passed." Motion to remand refused.

In Yarde *vs* B. & O. R. Co., 57 Fed., 913, upon this subject the Court says:

"The right of the removal is secured by the Constitution and laws of the United States whenever the requisite diversity of citizenship exists, and the matter in dispute exceeds, exclusive of interest and costs, the sum or value of $2,000. The right cannot be defeated by any artifice, evasion or omission. If at any time during the progress of an action in a State Court, by amendment or otherwise, a cause of action not before removable is changed or converted into one which is properly removable, the defendant, whether an alien or a citizen of another state than that of which the plaintiff is a citizen, has the right to file his petition and bond, and secure a removal of the cause into the proper Federal Court. It has often been held that if the defendant have a right to the removal, he cannot be deprived of it by the allowance by the State Court of an amendment reducing the sum claimed after the right of removal is complete. Kanouse *vs.* Martin, 15 How., 198. The converse of this proposition must be true—that a defendant not entitled to removal, who becomes entitled to it by reason of an amendment of the complaint allowed by the State Court, may remove the cause, although the time has elapsed within which his removal of the cause ought to have been asked for, if he promptly files his petition and bond after such amendment has been made. Huskins *vs.* Railway Co., 37 Fed. Rep., 504; Evans *vs.* Dillingham, 43 Fed. Rep., 177, 180."

In Mattoon *vs.* Reynolds, 62 Fed., 417, an action was brought and an amended complaint filed claiming damages in more than the jurisdictional amount.

The Court says:

"The single question presented is whether by the filing of the substituted complaint the defendant acquired a right of removal. The determination of this question depends upon whether the amended complaint states a new and different cause of action and one in which the original suit is merged. It is clear that in this case the second count presents a distinct cause of action, fraud, calling for a distinct remedy at law; money damages. The allegations contained in the first count and the relief therein prayed are incorporated in the second count."

Motion to remand denied.

Cookerly *vs.* Railway Company, 70 Fed., 277, was an action brought in the State Court against three defendants. On the trial a motion for non-suit as against two of the defendants was granted and the remaining defendant moved at once for removal to the Federal Court. The Court says on motion to remand:

"This case comes fairly within the rule established by the decision of the Supreme Court in the case of Yulee *vs.* Vose, 99 U. S., 539-546, in which case the petition for removal was filed after the case had been severed as to certain defendants by the decision of the Court of Appeals of New York which terminated the case as to some of the defendants, leaving it pending for a second trial as against the defendant Yulee alone. * * * * The Supreme Court held that the changed situation by the termination of the action as to some of the defendants entitled the one remaining defendant to then exercise the right of removal and based the decision distinctly on the ground that the joinder of other defendants prevented Yulee from removing the case prior to the first trial in the State Court. * * * * I acquit the plaintiff of any fraudulent purpose in joining McKenzie and Glenn as co-defendants."

The case of Yulee *vs.* Vose, 99 U. S., 539, is sufficiently stated in the foregoing citation:

In Powers *vs.* Chesapeake & Ohio R. Co., 65 Fed., 129, an action was brought against the railroad company for personal injuries arising out of the negligence of employes, and the servants at fault were joined with the company as defendants. Being residents of the same state with the plaintiff, a removal was thus prevented. Within the time, however, a petition for removal was filed urging that the individual defendants had been joined collusively and for the purpose of preventing removal,

and on motion the cause was remanded from the Federal Court to the State Court, it being found that the plaintiff and one of the defendants were citizens of the same state. The complaint set out on its face a joint cause of action. After the case had been returned to the State Court issue was joined, and long thereafter the plaintiff dismissed his action as against the individual defendants, so that the case would then proceed entirely against the railroad company. The defendant railroad company then filed another bond for removal which, upon objection, was denied and the cause proceeded to judgment for the plaintiff in the State Court. A transcript was duly filed in the Federal Court pursuant to the second application for removal, and upon a motion there made to remand the United States Circuit Court held that the cause was properly removed on the second application, it satisfactorily appearing that the individual defendants had been joined collusively for the purpose of preventing the exercise of such right and that, consequently, the trial and judgment in the State Court were void.

This case is in principle and fact essentially like the case at bar, except, the Court will note, that in our case the plaintiff has carried his apparent good faith one additional step. He certainly knew that no ground of action existed against the Chicago Great Western Company and was therefore confident that at the proper time the Court must necessarily relieve it from the possibility of a judgment against it in case a submission could be had to the jury. But, in our opinion, it can make no difference. The course of this litigation, which is a matter of record, in the Federal Court to which the removal was attempted, though not incorporated in the record of this case, still being true, we feel at liberty to refer to it, as we are confident the learned counsel for the plaintiff will not be inclined to dispute our assertion, shows with absolute conclusiveness, we think, the intention, at all hazards, to force the consideration of this case in the State Court against the right of the Receivers to removal. The action was originally commenced by this plaintiff against the defendant Receivers in the State Court; was thence removed to the Federal Court for this district, and after a sharp contest

referred by that Court to a master for the purpose of ascertaining the facts and reporting the damages to which the plaintiff was entitled, if any. The plaintiff then dismissed his action in the Federal Court and brought this present case against the Receivers and the Chicago, Great Western Railway Company. This further fact exists in this case than existed in the case last above cited, upon which the Court based its ruling that the removal should have been had.

The argument of the Powers case is very clear and convincing, covering the ground entirely, and, it seems, must be both upon authority and upon reason conclusive of the rights of the defendant Receivers at this time to have relied upon their right of removal.

In the case of Hukill *vs.* Chesapeake & O. R. Co., 65 Fed., 138, decided at the same time and by the same Court as the case last above cited, the same ruling is made, though it appears from the facts that an application to remove while individuals were joined with the company as defendants in the Court below was not made.

In Kanouse *vs.* Martin, 15 Howard, 198, under the removal act in which the jurisdictional amount was then fixed at $500, after the action was brought demanding damages of more than the jurisdictional amount and after a petition for removal had been filed, plaintiff obtained an amendment reducing his claim to $499, and it was held that such amendment could not affect or prevent the defendant's right to remove.

The case of Powers *vs.* Chesapeake & Ohio Ry. Co., above referred to, was brought to this Court by the plaintiff below upon writ of error and upon a certificate of the question of the jurisdiction made by the trial Court, and the right of removal invoked in the case at bar at the close of the plaintiff's case and after the dismissal of the co-defendant seems to be established beyond all question.

Powers *vs.* Chesapeake & Ohio Ry. Co., 169 U. S., 92.

Upon another theory as well, we submit, that after the dismissal of the action, by direction of a verdict, as against the Chicago Great Western Railway Company, the Receivers had

absolute right to remove, although, as we contend, no clearer or greater right than existed in their favor in that regard at the filing of the original complaint. It has been shown, we think, in the preceding argument, that there was but one legal cause of action stated in the complaint, and that was for negligence against the Receivers; that no legal ground of recovery was set out as against the Chicago Great Western Company; and that in any event the action against the Receivers was founded upon an entirely different principle of law from the alleged action against the Chicago Great Western Company and in no regard could be held to be joint. This claim was finally set at rest by the action of the trial Court, which held that there was not and had not been any cause of action alleged against the Chicago Great Western Railway Company. It was the duty of the Court to disregard the attempted misjoinder of causes of action and upon the Receivers' petition, to treat the cause set out against them as though it were the sole cause of action at issue. The Receivers had defended in the trial Court entirely under protest, insisting at every step that the jurisdiction of that Court had been lost. Hence, when this contention had been thus affirmed by the State Court on the theory of but a single, separable cause of action, which was against the Receivers, their right to remove had become absolutely certain.

Arrowsmith *vs.* Ry. Co., 57 Fed., 165.
Arapahoe County *vs.* K. P. Ry. Co., 4 Dillon, 277.

In the former of these cases it was held that no cause of action was stated against the resident defendants joined for the purpose of preventing removal; and in the latter, no relief was demanded in the complaint against the same sham defendants. It was held that the joinder of such defendants without the statement of a cause of action against them did not prevent the removal. So, upon either theory, it becomes clear that the Receivers' right to change the jurisdiction after the direction of the verdict for the railway company had then become settled, first, under the original petition because it was then established that there was but a single cause of action stated and that

against the Receivers; and, second, under the second application to remove because if the complaint had originally stated a joint cause of action it was then determined that it had been collusively so stated and the case had reached a form in which the defendants might rely upon the exercise of their right.

Hence, if for any cause at this stage of the trial the Receivers' right to remove had become clear, it was the duty of the trial Court to proceed no further, and in refusing the removal it erred.

HOWARD MORRIS,
THOMAS H. GILL,
Counsel for Plaintiffs in Error.

October, 1899.

No. 150.

Brief of Morris for P. C. (mo.

BRIEF FOR PLAINTIFFS IN ERROR ON MOTION TO DISMISS AND AFFIRM.

Filed Nov. 20, 1899.

Supreme Court of the United States,

OCTOBER TERM, A. D. 1899.

No. 150.

HENRY F. WHITCOMB and HOWARD MORRIS,
as Receivers of the Wisconsin Central Company,
Plaintiffs in Error,

vs.

JOHN A. SMITHSON,
Defendant in Error.

In Error to the Supreme Court of the State of Minnesota.

HOWARD MORRIS,
THOMAS H. GILL,
Counsel.

EVENING WISCONSIN CO., PRINTERS, MILWAUKEE.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, A. D. 1899.

No. 150.

HENRY F. WHITCOMB AND HOWARD MORRIS, AS RECEIVERS OF THE WISCONSIN CENTRAL COMPANY,

Plaintiffs in Error,

vs.

JOHN A. SMITHSON,

Defendant in Error.

BRIEF FOR PLAINTIFFS IN ERROR ON MOTION TO DISMISS AND AFFIRM.

The defendant in error moves to dismiss the writ herein, basing the right upon two grounds:

1st. That no federal question is involved.

2nd. Because this Court has no jurisdiction of the cause as is shown by the record.

He also moves to affirm the judgment below for the reasons:

1st. That the writ is taken merely for delay.

2nd. That the jurisdictional question raised by the record is too frivolous to require argument.

The record shows an action for personal injuries against two defendants, the Receivers and another Railway Company; that the Receivers removed the action to the Federal Court, alleging diverse citizenship, federal receivership, sep-

arable controversies, collusive joinder of defendants to prevent removal, and no cause of action against the non-removing defendant.

The cause was remanded to the State Court because a joint action, at least in form. The Receivers stipulated to try the case in the State Court if allowed to answer therein. The case was tried to the conclusion of the plaintiff's evidence, when it was dismissed as to the defendant not joining in the removal and which was charged as having been collusively joined as defendant to prevent removal. Thereupon the Receivers, having thus become sole defendants and the action removable, sought by proper proceedings then to remove. That removal was denied and the judgment rendered was affirmed upon appeal by the State Supreme Court.

A.

The record shows that a right, privilege or immunity under the laws of the United States set up and claimed by the defendants below, to-wit, the right to remove the cause to the Federal Court for trial, has been denied to said defendants by the State Court.

That judgment is open to review in this Court.

R. R. Co. *vs.* Fitzgerald, 160 U. S., 556.

Stone *vs.* South Carolina, 117 U. S., 430.

Most of the argument of counsel for the defendant in error is directed to two points: First, that the remanding order was final and restored jurisdiction to the District Court of Ramsey County, Minnesota, to try and determine the cause. Second, that the stipulation of the Receivers, defendants in that case, to the trial in the State Court was binding and precluded any attempt at a subsequent removal.

The first point urged may be conceded, for the plaintiff in error here has not relied upon any question as to that order, in regard to the case in its then condition pending against both defendants. We believe, however, that there is much

more than mere argument in the suggestion of the brief on the merits now on file here, that inasmuch as the remand was made upon an erroneous view of the complaint, and as the cause of action was in reality sole and separable against the Receivers, and the case in fact a removable one under the law, the removal working a loss of jurisdiction in the State Court, such jurisdiction was not restored by the error of the remanding Court.

Upon the other point we submit that the defendants below acted in absolute accord with their stipulation to try that cause in the State Court and the suggestion of bad faith by either the Supreme Court of Minnesota or the counsel upon the other side, comes with poor grace in view of the conduct of the litigation by the defendant in error.

If, as counsel contends, the remanding order was final and binding upon these defendants below, where could the case be tried other than in the State Court? In so stipulating were not these defendants below but making formal announcement of an absolute right of the plaintiff that the defendants could not have altered in any way? Why, if counsel for the plaintiff in the State Court were in good faith, did they draw and procure that agreement when they knew that there could be no other Court of trial?

Moreover, were these defendants to be denied the right of saving error in the jurisdiction in that trial Court if it existed because they had stipulated that the case should there be tried? And what valid reason does the stipulation furnish that Court to refuse the proffered amendment to the answer setting up facts to show the lack of jurisdiction? Still that is the reason assigned for the refusal to permit such amendment.

It appears from the claim of counsel that because these defendants had stipulated to assure the plaintiff his absolute right to a trial in that State Court, they forsooth denied themselves the protection of a fair and errorless trial. But, we may have given too much importance to these inconsistencies,

as the question of this stipulation seems to be wholly foreign to a consideration of the reasons we urge here for a reversal.

Had these defendants below departed from their agreement, complaint of counsel might have had some color of foundation. But they did not. So far as the cause was made up at the time of the stipulation, it was tried as agreed therein.

It must be remembered that the plaintiff below selected and stated his cause of action, and chose his opponents. He selected both as responsible. The Receivers had no choice but to be impleaded with the other defendant company. The Receivers did not experiment with their case in the State Court. They were forced to remain there for trial, wasting their best efforts to be relieved. The plaintiff below was doing all the experimenting. He knew when he joined the Railway Company as a defendant, when he stated its negligence to be the failure to provide proper rules, while he submitted his evidence without a question upon that subject, all through, he knew what was expected to be the outcome. And hence, when the case had thus been changed from a joint cause of action against all, to a separate cause of action against these defendants below, when it had thus in form become as it had all the time before in fact been, a removable case, and only then, did these defendants move for a transfer of the jurisdiction. That stipulation, giving it the broadest scope claimed by the plaintiff in error, yielded up its binding force when the Railway Company defendant was dismissed. That joint action ended—became legally determined in the direction of the verdict. The case thereupon, in legal significance, became substantially a new action for removal purposes by reason of taking on its separable form. The stipulation was never intended to apply to an action not in being nor in contemplation of the Receivers when the stipulation was made.

That the action thus took new form for such purposes is announced by the doctrine of many cases in the Federal Courts.

Huskins *vs.* C. N. O. & T. P. R. Co., 37 Fed. Rep., 504.
Kanouse *vs.* Martin, 15 Howard, 198.
Evans *vs.* Dillingham, 43 Fed. Rep., 177.
Yarde *vs.* B. & O. R. Co., 57 Fed. Rep., 913.
Mattoon *vs.* Reynolds, 62 Fed. Rep., 417.
Cookerly *vs.* R. Co., 70 Fed. Rep., 277.
Yulee *vs.* Vose, 99 U. S., 539.
Powers *vs.* C. & O. R. Co., 65 Fed. Rep., 129.
Powers *vs.* C. & O. R. Co., 169 U. S., 92.

Moreover, it would seem upon a fair reading of the stipulation, that it was never the purpose of either party thereto that it should have the vast significance and weight which the counsel for the defendant in error, since the trial, has labored to give it. It contains no language capable, by reasonable construction, of establishing a consent to try the cause in the State Court at all events. It is rather and was always by both parties intended to be merely a stipulation of trial *at a certain term* that the plaintiff might not be prejudiced by delay. The great consideration which plaintiff's counsel sought in insisting upon it was to preclude the defendant Receivers from contesting the payment of the judgment if any recovered, which must be thereafter presented for allowance in the original action in which the Receivers had been appointed. Please note that its language is "hereby stipulate and agree that the plaintiff shall have a trial of this case *in said Court at the June term thereof 1896.*" Note again that it was made upon the *4th day of June, 1896*, when the said June term was either pending or at hand. Is it not hypercritical to contend that the plain intent and meaning of the whole document is to obviate a term's continuance, particularly when we remember that under the then circumstances of the case no trial could possibly have been had in any other Court? More force would follow counsel's argument if this stipulation were a bald agreement to submit to the jurisdiction of the state tribunal as he now seeks to construe this plain and unambiguous language.

Can the language of this stipulation be tortured into a waiver of the privileges of removal which the Receivers sought to enforce? If the suit was in fact removable in the first instance, though the attempt to change the forum was ineffectual, the jurisdiction had departed from the State Court. When therefore the defendant Receivers were forced to trial in that tribunal, though they were not able to obtain review of the order of remand, because non-appealable, any stipulation they might make, any steps they might take, in protection of their legal rights, short of an express voluntary renunciation of their right, ought to militate against them no more than similar conduct in a forced trial in a State Court, because kept there by the error in declining the proper application to remove. The principle is precisely the same.

Ry. Co. *vs.* Dunn, 122 U. S., 516.
Removal Cases, 100 U. S., 457.

The rule should be, and we believe it is, that to constitute such waiver, plain, unequivocal language to the very point is necessary.

B.

In the brief upon the merits, now on file, we have argued that the right of removal upon the dismissal of the action as to our co-defendant below, became absolute, either by way of amendment to the original petition or by new petition and bond for that purpose.

We have relied, in support, upon the cases in this Court and the inferior courts of appeal, cited in the brief.

To meet this contention, in the brief upon this motion, and for the purpose of showing that the right of removal did not then accrue, counsel for the defendant in error urges that our authorities upon this point turn altogether upon the fact that the amendments of ad damnum clauses, the dismissal of joint defendant and other changes which have been held to convert

a non-removable into a removable cause, have been the result of the *voluntary* action of the plaintiff before actual trial had commenced.

If this were so, we can perceive no difference in principle as applied to the case at bar. The defendant Receivers had sought a removal, setting up no cause of action against the co-defendant, an actual separable controversy, if any, and collusive joinder to prevent removal. The cause was remanded and the order was not subject to review. They were forced to trial, and proceeded until the correctness of the allegations in their petition to remove were established by the dismissal of the co-defendant.

The facts upon which all concede that the removal would have been incontestible thus became established. Now, so far as the rights of the Receivers were concerned, how could they be more bound in principle by the necessity of proving the correct facts, than if the plaintiff below had conceded them without actual proof and had entered a voluntary non-suit before, or at any preceding step of, the trial? If the Receivers had kept their co-defendant in the trial, or had prevented the plaintiff from dismissal, it might well be claimed they ought not to be allowed to profit thereby, for they might thus come within the rule condemning the experiment of a trial in the State Court. The plaintiff had able and astute counsel, soon to be a member of the Supreme bench of his state, and we are confident he must always have known that by the rules of the law no cause of action was stated against the defendant Railway Company. Moreover, notwithstanding any possible doubt of the validity of his present judgment, counsel did not think it worth while to question the conclusions in that respect of the trial Court by an appeal, finally to determine the value of his complaint.

The very foundation premise of counsel's argument, however, fails. In the decisions covering the point raised, the right to remove becomes vested and available whenever the proper conditions are reached, even after the lapse of the time

fixed by the removal act, viz., after the time to plead, answer or demur.

In Cookerly *vs.* Ry. Co., 70 Fed. Rep., 277, after the plaintiff had rested, an involuntary non-suit was granted as to one defendant, and upon an amended complaint, removal was had by the defendant Railway Company.

In Yulee *vs.* Vose, 99 U. S., 539, the petition to remove was filed after a severance of causes of action by decision of the Court of Appeals in New York reversing the judgment of the lower Courts.

The plaintiff had full notice in the trial Court that the Receivers regarded the case in the beginning as removable by them, and their subsequent course being never inconsistent, the plaintiff proceeded at his peril.

To sum up briefly, we submit that the motion to dismiss and affirm should be denied for the reason that it does involve a federal question, to-wit, the right of removal; because, being a writ of error to review the judgment of the highest Court of the State of Minnesota, denying the plaintiffs in error the right of removal, this Court has jurisdiction; because if this Court has such jurisdiction, the Courts of Minnesota have not; and because it is not manifest that the writ is taken merely for delay, or that the question of jurisdiction is too frivolous for argument.

November, 1899.

HOWARD MORRIS,
THOS. H. GILL,
Counsel for Plaintiffs in Error.

SUPREME COURT

OF THE UNITED STATES.

OCTOBER TERM, 1899.

No. 150.

H. F. WHITCOMB and HOWARD MORRIS, as Receivers of the Wisconsin Central Company,
Plaintiffs in Error,

vs.

JOHN SMITHSON,
Defendant in Error.

NOTICE, MOTION AND BRIEF FOR DEFENDANT IN ERROR.

JOHN A. LOVELY,
Attorney for Defendant in Error.

SUPREME COURT

OF THE UNITED STATES.

OCTOBER TERM.

No. 150.

H. F. WHITCOMB and HOWARD MORRIS, as Receivers of the Wisconsin Central Company,

Plaintiffs in Error,

vs.

JOHN SMITHSON,

Defendant in Error.

To Messrs. Thos. H. Gill and McDonald & Barnard, and H. F. Whitcomb and Howard Morris, Receivers.

Gentlemen:

You will please take notice, that upon the annexed motion and brief, which will be submitted to the Honorable the Supreme Court of the United States on Monday, the 27th day of November, 1899, the defendant in error, through his counsel, will ask that the said writ of error be dismissed upon the ground stated in the annexed motion, or that if said court shall decline to dismiss said action, that the judgment therein, brought into said United States Court upon said writ of error, be affirmed upon the grounds stated in said motion and for such other relief on said motion as may be just and proper.

John Adamly,

Attorney for Defendant in Error.

SUPREME COURT

OF THE UNITED STATES.

OCTOBER TERM.

No. 150.

H. F. WHITCOMB and HOWARD MORRIS, as Receivers of the Wisconsin Central Company,
Plaintiffs in Error.

vs.

JOHN SMITHSON,
Defendant in Error.

Now comes the above named John Smithson, defendant in error, by his counsel, John A. Lovely, and moves this honorable court that the writ of error heretofore directed to the Supreme Court of the state of Minnesota to return the record of its proceedings in said cause to this court, be hence dismissed upon the ground that no federal question is involved therein as appears by the return of such record into this court.

For the further reason that this honorable court has not jurisdiction of said cause, but the District Court of the State of Minnesota, for the county of Ramsey, wherein said cause was tried, and wherein

judgment was duly rendered in favor of said defendant in error, which said judgment was affirmed by the Supreme Court of the state of Minnesota, has final and ultimate jurisdiction of said cause and the whole thereof.

And it is further moved in connection with said motion to dismiss and in addition thereto that the said judgment of the said District Court of Ramsey county, state of Minnesota, which judgment was affirmed by the Supreme Court of Minnesota be affirmed by this court upon the ground that it is manifest the writ of error was taken for delay only, and that the question on which jurisdiction depends is so frivolous as not to need further argument in this court, as will more fully appear at large by the brief hereto attached for the consideration of this court upon such motion in connection with the transcript of record heretofore printed.

John A. Eberly

Attorney for Defendant in Error

SUPREME COURT

OF THE UNITED STATES.

OCTOBER TERM, A. D. 1899.

No. 150.

HENRY F. WHITCOMB and HOWARD MORRIS, as Receivers of the Wisconsin Central Company,

Plaintiffs in Error.

vs.

JOHN SMITHSON,

Defendant in Error.

In error to the Supreme Court of Minnesota.

Brief on motion to dismiss coupled with a motion to affirm.

It is the claim of the moving party—the defendant in error—that no Federal question is involved in this controversy, and that at all events the right of the defendant in error is so clear to the judgment below in his favor, that he is entitled to have the same affirmed under the provisions of rule 6, Sec. 5, as applied in

Arrowsmith v. Harmoning, 118 U. S. 194.

Church v. Kelsey, 121 U. S. 282 and subsequent cases.

Chanute City v. Trader, 132 U. S. 210.

Richardson v. R. R. Co., 169 U. S. 128.

The matters of contention here have all been fully considered by the Supreme Court of Minnesota, and the issues involved, are so aptly and accurately stated in the opinion of that court and present so clearly the only questions that can be controverted in this tribunal, that we cannot do better than to adopt the same in presenting the reasons which support our motion, *premising* that the italics are our own.

This was an "action for personal injuries received by plaintiff while he was serving defendant Chicago Great Western Railway Company as a locomotive fireman, and in a collision between the locomotive on which plaintiff was at work and another operated by defendants, Whitcomb and Morris, as receivers, under appointment by the United States Circuit Court, of the Wisconsin Central Railway Company. It was alleged in the complaint that both of these defendants operated locomotives and trains over about four miles of track owned by the Chicago & Northern Pacific Railway Company, in the City of Chicago, and it was on this piece of track that the collision occurred. The negligence alleged on the part of the receivers was in allowing their locomotive to stop and remain standing in the night-time at a certain place on their tracks, and when there was imminent danger of a collision, without giving proper or any signals of having so stopped; while the negligence on the part of the Chicago Great Western Company was alleged to be an omission and failure on its part to adopt or establish proper or any rules for the giving of warn-

ing signals by its own or other locomotives or trains while being operated on said track."

"1. The first question in the case grows out of certain steps taken by the receivers in an effort to remove the cause to the Federal courts. To this end, and in due time, the receivers filed a petition for removal and a bond in the District Court for Ramsey county, in which court the action has been instituted. The other defendant did not join in this petition, but duly answered in the action. An order of the District Court removing the cause as petitioned was made, and a few days afterwards, upon the hearing of an order to show cause, *the case was remanded by the Federal court to the Ramsey county District Court upon the ground that it had been improperly removed from the latter,* the formal order remanding being filed in February, 1896. *The receivers were then in default for want of answer, and on the 4th day of June stipulated in writing with plaintiff's attorneys, in consideration of being relieved from this default, and in consideration of their being allowed to answer in the action, that the issues so made should be tried in said District Court at the June term, 1896, and that in case of a final judgment against them they would not oppose the allowance of such judgment by the master in chancery.* An answer was served in accordance with this stipulation, to which plaintiff replied, and thereafter the cause was continued by consent of counsel for plaintiff and for the receivers until the April term, 1897. It then came on for trial as against both defendants, but counsel

for receivers, *in disregard of the remanding order of the Federal Court and their own stipulation,* attempted to interpose an amended answer, alleging, among other things, a want of jurisdiction on the part of the District Court, on the ground that the cause had theretofore been duly removed to and was then pending in the Circuit Court for the United States, and not elsewhere; and also objected to the introduction of any evidence, upon the ground that the case was still pending in the United States Circuit Court. The District Court very properly refused to permit the amendment, and plaintiff submitted his proofs to a jury. Defendants offered no testimony. The court then directed the jury to return a verdict in favor of the Chicago Great Western Company upon the ground that plaintiff had failed to make out a case against it; whereupon counsel for receivers filed another removal petition and bond, demanding that, as the Chicago Great Western Company was no longer a defendant, the case was then one for removal. The court below refused to consider the petition, charged the jury, and, in due season, separate verdicts were returned—one in favor of plaintiff, and against the receivers, for substantial damages; the other, of no cause of action as to the railway company." Transcript of Record, pages 124-125 and 126.

By reference to the petition for writ of error it will appear that the facts stated by the Supreme Court of Minnesota are conceded and adopted by the learned counsel for plaintiffs in error. These

facts are pertinently stated in such petition in the fourth and fifth paragraphs as follows:

"Fourth. That said bond on removal was approved by the State court and a transcript of the record in said action therein duly sent to and docketed in the Circuit Court of the United States for the District of Minnnesota, and that said plaintiff, Smithson, appeared in the said United States Circuit Court, and, answering said petition for removal, denying collusion and fraud to prevent removal, moved to remand said action to said State Court, and, after a hearing upon said motion, the said Cirsuit Court of the United States for the district of Minnesota, by Nelson, district judge, on the 6th day of February, 1896, granted the motion to remand 'on authority of Thompson v. C., St. P. & K. C. R'y Co. and C., M. & St. P. R'y. Co., (60 Fed. 773).' The case thus referred to was remanded for the reason that there was no separable controversy."

"Fifth. That thereafter and on the 4th day of June, A. D. 1896, the defendants, receivers, being in default in said State court for want of an answer, stipulated in writing with the attorneys for the plaintiff Smithson that in consideration of waiving said default and permitting the said defendants, receivers, to answer therein, the said cause should be tried at the June term of said State court, 1896, 'and in case of final judgment in said action in favor of said plaintiff and against said receivers, that the said receivers would not oppose the

allowance thereof before the master in chancery' in the original equity case in which the said receivers had been appointed."

Transcript of Record, page 4.

In this connection it may be material to consider the full text of the stipulation above referred to, which is as follows. *Totidem verbis*:

STATE OF MINNESOTA, DISTRICT COURT.
County of Ramsey.

JOHN SMITHSON,

Plaintiff.

vs.

THE CHICAGO GREAT WESTERN RAILWAY COMPANY and H. F. WHITCOMB and HOWARD MORRIS, Receivers of the Wisconsin Central Company,

Defendants.

Whereas, defendants, H. F. Whitcomb and Howard Morris, Receivers above named, have not answered herein, and are in default of an answer. Now, in consideration that plaintiff allow said defendants, H. F. Whitcomb and Howard Morris, receivers, to serve an answer herein, said defendants, H. F. Whitcomb and Howard Morris, receivers, hereby stipulate and agree that the plaintiff *shall have a trial* of this case in said court at the June term thereof, 1896, so far as defendants H. F. Whit-

comb and Howard Morris are concerned, and in case of a final judgment in said action in favor of said plaintiff against said receivers that the receivers will not oppose the allowance of the same before the master in chancery.

June 4th, 1896.

J. A. LOVELY,
J. F. GEORGE,
Attorneys for Plaintiff,
THOS. H. GILL and
McDONALD & BARNARD,
Attorneys for Defendants H. F. Whitcomb and Howard Morris, Receivers.

Filed April 20th, 1897.

See pages 25 and 26, Transcript of Record.

After this stipulation was made, the receivers answered and plaintiff replied, thus joining issue in the State Court.

Transcript of Record, pages 26 and 27.

The case was then duly noticed by plaintiff's attorneys and was afterwards again continued by stipulation.

Transcript of Record, page 28.

It appears then, that the essential facts here stated relative to the jurisdictional question involved which is now the only matter before this court are:

1st. That the joint action against the receivers of the Wisconsin Central Company and the Chicago Great Western Company was duly remanded

upon the motion of the plaintiff below to the State Court where it had been commenced.

2nd. That after the order remanding the same had been filed in the State Court, the plaintiff in error agreed for a consideration to waive any question of jurisdiction and try the case in the State Court.

I.

The right to remand is res judicata and has been decided adversely to plaintiff in error.

The effect of the order of the Federal judge, remanding the cause to the State Court, ought not to be open to doubt or conjecture, providing that court had the legal power to make such an order, and that it had such power is not now an open question. It is no longer a matter of contention either, that such power when so exercised is final and not open to further discussion or contest in the further proceedings of this particular cause.

It is provided by the Act of Congress under which the removal was sought, and the subsequent remand enforced that:

"Whenever any cause shall be removed from any State Court into any Circuit Court of the United States, and the Circuit Court shall decide that the cause was improperly removed and order the same to be remanded to the State Court from whence it came, such remand shall be immediately carried into execution, and no appeal nor writ of error from the decision of the Circuit Court so remanding such cause shall be allowed."

Supt. to Revised Statutes of United States 1874-1891, pages 611-614, 25 Stats. 433.

It will be seen that this provision of the law is comprehensive, makes no distinction whatever as to the character of the defendants, whether the same be individuals or corporations, but embraces all cases wherein a controversy may arise between the State and the Federal judiciary, upon the right to hear and determine the cause and substantially declares that the judgment or order of the Federal Court remanding the cause shall be final in every case.

The authoritative evolution of the law by the Federal Court of last resort recognizes the full force of the Statute referred to and the conclusions we have drawn as to its undoubted meaning and application.

Morey v. Lochart, 123 U. S. 56, 58.

Wilkenson v. Nebraska et al., 123 U. S. 286-7-8.

Sherman v. Grinnell, 123 U. S. 679-80.

Railway Companies v. Thouron, 134 U. S. 45 to 67.

Gurnee v. Patrick County, 137 U. S. 143-4-5.

In re. Penn. Co. Petr., 137 U. S. 451 to 58.

Missouri Pacific v. Fitzgerald, 160 U. S. 556 to 581.

A review of these decisions leads to the unanswerable conclusion that the decision of the subordinate Federal Court remanding a cause is absolute; in each of the above cases will be found emphatic assertions of this conclusion so clear and decisive, that it would seem that "a way-faring man could not err therein."

And the reason for this rule of final determination is stated in the last authority cited to be "to contract the jurisdiction of the Federal Courts."

Missouri Pacific v. Fitzgerald, *Supra.*

Counsel claimed that in the last case there are some qualifications in favor of receiverships, we can find none, the conclusions in their application are unlimited, and as to the present status of the question of jurisdiction, are summed up in the following language:

"If the Circuit Court and the State Court go to judgment respectively, each judgment is open to revision in the appropriate mode."

The Removal cases, 100 U. S. 457.

"But if the Circuit Court remands a cause and the State Court thereupon proceeds to final judgment, the action of the Circuit Court is not reviewable on writ of error to such judgment. A State Court cannot be held to have decided against a Federal right when it is the Circuit Court, and not the State Court, which has denied its possession. The Supreme Court of Nebraska rightly recognized the courts of the U. S. to be exclusive judges of their own jurisdiction, and declined to review the order of the Circuit Court."

Missouri Pacific v. Fitzgerald, *Supra* 582.

We commend particularly for the reasons of the action of congress, the last three poragraphs of the last cited case.

Our own Supreme Court has held that where the Federal trial Court decided on the question to remand, it will act in accordance with such determination. In a well considered case where this question was involved it held that the State Court

in which the action was brought "had jurisdiction of the subject matter and of the parties. Its right and power, as well as its duty to proceed to a trial, after the trial court had refused to entertain the case and had remanded it, ought not to be challenged. The ruling of the latter when remanding cannot be reviewed in the State Courts."

Tilley v. Cobb, 56 Minn. 295-299.

See Roberts v. Railway, 48 Minn. 521.

The inevitable result of any other rule would be to deprive the plaintiff of any redress whatever. For since the Federal Court has denied jurisdiction the State Court ought not and will not allow the substantial rights of plaintiff to be foundered in any such sea of doubt and difficulty, but will enforce the remedy of which the plaintiff would otherwise be deprived.

The effort of the plaintiff in error to deprive the State Court of jurisdiction at the close of the case on its trial should not meet with any favorable consideration at the hands of this court.

The situation so far as the question of jurisdiction is concerned was not changed by the order of the court at the end of the trial directing the verdict in favor of one of the parties—the Chicago Great Western Company. The whole testimony had been introduced to support every issue. The Great Western Company had rested, the plaintiff in error had rested also, when the Great Western Company asked for an instruction to the jury that they find for the defendant which was granted. Upon this

direction of the court without any judgment or final order being entered, a petition and bond was filed for removal as the result of the contention of the parties in the ordeal of legal controversy.

Transcript of Record, pages 107-108.

The only cases which counsel has been or will be able to urge against the views contended for above are those where, before the actual trial commenced, there was by the *voluntary* action of the plaintiff in the state court, such a change of parties as to eliminate or reform the jurisdictional conditions entirely.

Such is the recent case of Powers v. The Chesapeake & Ohio, 169 U. S. 92.

From first to last defendant in error had contended that the Great Western Company was liable. By the direction of the State Court a verdict was ordered against him on that proposition.

It will not be presumed to be the fault of the defendant in error, so far as jurisdiction is concerned, that the court, over his objection, ordered a verdict against one of the defendants in the action.

In Arrowsmith v. Nashville Railroad Co., 57 Fed. 169, it is said:

"That ultimately it may turn out that one is not liable at all and the other exclusively so, *is a question on the merits and does not effect the jurisdiction.*"

While the petition for removal alleged that the suit was collusively commenced against both parties, this charge was denied by the answer of de-

fendant in error and in whose favor such issue was determined by the Federal judge whose decision is conclusive upon that matter.

Black's Dillion on Removal, p. 232, Sec. 137.

Louisville, etc. Ry. Co. v. Wangelin, 132 U. S. 599.

It has been held that where proceedings in the trial of a cause had eliminated certain defendants, leaving parties in the case that would have made the action originally removable, that it was then too late to attempt such a removal, and this before a trial in the State Court had commenced, *"for a party may not experiment on his case in the State Court,"* and upon an adverse decision then transfer it to the Federal Court.

Rosenthal v. Coats, 148 U. S. 142-145.

Jifkins v. Sweetzer, 102 U. S. 177.

When the State Court was invested with jurisdiction of the case, the order of the Federal Court was not only decisive, but plenary, it transferred jurisdiction of all parties to the controversy to do between them what that court in the exercise of its judgment under due process of law should deem best. Having thus acquired jurisdiction, and having entered upon the trial of the case, it is not clear to us how any ruling which it might make *pendente lite* in the exercise of its jurisdiction, could deprive it of its rights to proceed further, or prevent such court from hearing the case to its ultimate determination of the rights of each or all the parties. The theory of the plaintiff in error that the ruling of

the trial court upon the ultimate rights of one of the parties deprived it of the further right to proceed against the other, could only be supported by reading into the act of congress the proviso that the State Court should have jurisdiction to determine the case if it decided the issue in a certain manner, otherwise not. Such a concession of jurisdiction would be a "barren sceptre" hardly worth acceptance.

II.

The stipulation to try the case in the State Court was conclusive upon all parties.

The District Court of the State of Minnesota, for the County of Ramsey, was a court of general jurisdiction under the constitution of that state, having plenary power to hear and determine all controversies at law and in equity, and saving the right of removal provided for by congress, such court was competent to try that issue.

After the attempt to remove had failed and the Federal Court to whom it was sought to transfer this cause had remanded it under the act of congress (supplement to Revised Statute 1887 to 1891, page 613. 25 Stat. 433) the State Court then had the only power existing to hear and determine the case. But if there could have been any doubt as to the jurisdiction of the State Court, such doubt was dispelled by the agreement which we have quoted.

Were it competent as a matter of practice to review the order of Judge Nelson of the Federal

Court remanding the cause, yet this agreement made by the parties at bar by which the plaintiff in error, who was then in default, obtained leave to answer and to contest the right of plaintiff below to recover, forecloses them from any further controversy upon the question of jurisdiction as fully and effectually as if the receivers had put in an answer without filing any petition or bond of removal.

The disposition of this question by the Supreme Court of Minnesota cannot be answered. It held "the receivers, in consideration of being permitted to answer the complaint after having been in default for several months, expressly agreed to try the case in the State Court. Through this agreement they secured a substantial right—the right to answer. If prior to that time there had been a real controversy over the receivers' right to have the cause tried in the Federal Court, *it was then and there settled by a formal stipulation, deliberately entered into by the counsel*, which they must abide by, and which will be enforced by the courts, in the interest of fair dealing and professional good morals. It seems hardly necessary to conclude on this feature of the case by saying that a defendant who is entitled to have his case removed from a State to a Federal Court, or from the latter to the former, there being no question of jurisdiction over the subject-matter or over the parties, may waive his rights to insist upon a removal by his acts or omissions."

Transcript of Record, page 126.

"A party to a suit in a state court may, so far as concerns that particular litigation, waive his right to remove the same to the Federal Court. Such waiver touches no question of public policy; its effectiveness stands upon the maxim that any man may renounce a legal right which is conferred *only for his own advantage.* And he may make such waiver, after the suit is brought, not only by a stipulation or agreement, but by conduct which is equivalent to a waiver."

Black's Dillion on Removal, page 20, Sec. 15.

Hanover Nat. Bank v. Smith, 13 Blatchf., 224. Fed. Cas. No. 6035.

Wadleigh v. Standard Ins. Co., 76 Wis. 439; 45 N. W. 109.

Home Ins. Co. v. Curtis, 32 Mich. 402.

Evans v. Smith, 21 Fed. 1.

First Nat. Bank v. Conway, 67 Wis. 210; 30 N. W. 215.

Hudson River Co. v. Day, 54 Fed. 545.

Amy v. Manning, 144 Mass. 153.

Under the practice acts of Minnesota the receivers were required to answer the plaintiff's complaint in twenty days from the service of the same upon them. They permitted several months to pass meantime remaining in default, and could not have been heard by reason of such default either in the State or Federal Courts. When the order to remand was made and the case returned to the State court the plaintiff, under the statutes of Minnesota, could have asked for a reference and proven his case without the intervention of the defendant receivers, but the receivers, who had permitted such default to occur desired to answer and contest their

rights and to obtain that right agreed to waive all questions of jurisdiction if they were permitted to do so, and it was not on the part of such receivers merely a submission to a rule of practice after the order to remand, but a deliberate concession by them of any privilege which they might have or desired to assert, to question the right of the State Court to try the cause, and it would seem as suggested by the Supreme Court of Minnesota to be an act of questionable good faith for them to afterwards insist that the court in which they consented to try the cause did not have jurisdiction to hear and determine it, and under the views and authorities above presented we submit the stipulation forecloses the receivers from questioning the jurisdiction of the court in which the verdict was rendered against them.

It is respectfully submitted for the reasons stated that the State Court had jurisdiction and that its ultimate judgment should not be disturbed.

John A. Lovely,

Attorney for Defendant in Error.

Supreme Court of the United States.

OCTOBER TERM, 1899.

No. 150.

H. F. WHITCOMB and HOWARD MORRIS, as Receivers of the Wisconsin Central Company,
Plaintiffs in Error.

vs.

JOHN SMITHSON,
Defendant in Error.

ERROR TO THE SUPREME COURT OF MINNESOTA.

BRIEF FOR DEFENDANT IN ERROR.

JOHN A. LOVELY,
Attorney for Defendant in Error.

Supreme Court of the United States.

OCTOBER TERM, 1899.

No. 150.

H. F. WHITCOMB and HOWARD MORRIS, as Receivers of the Wisconsin Central Company,
Plaintiffs in Error.

vs.

JOHN SMITHSON,
Defendant in Error.

ERROR TO THE SUPREME COURT OF MINNESOTA.

BRIEF FOR DEFENDANT IN ERROR.

This is an effort to review the order of the Minnesota Supreme Court affirming a judgment entered upon a verdict rendered in the District Court for Ramsey County in favor of *Defendant in Error.*

A motion of recent date (November 27) was entered to have the order and final judgment of the Minnesota Supreme Court affirmed under Rule 6th

Section 5; since such motion was filed it has been stipulated by counsel that the further consideration of the questions involved in the hearing in this court be finally submitted upon printed briefs, and that all oral argument be waived therein.

See stipulation on file.

In accordance with such stipulation, Counsel for *Defendant in Error* herewith submits such concurring and additional views in support of the judgment of the Minnesota Court as appear cogent and necessary on the final presentation of the questions involved.

STATEMENT OF ISSUES IN THIS COURT.

This action was brought in the Ramsey County (Minnesota) Court against the Great Western Company and the Receivers of the Wisconsin Central Company, both non-resident companies, by John Smithson (Defendant in Error) a citizen of Minnesota, who had received very serious injuries while in the employ of the Great Western Company as a locomotive fireman in the Chicago yards while he was at work in the regular course of his duty.

The Receivers sought to remove the whole cause without the concurrence or co-operation of the Great Western Company into the United States Circuit Court for the District of Minnesota, upon several grounds, among others that there was a joinder of the two companies for the purpose of defeating the jurisdiction of the Federal Court, and affidavits were presented by the petitioners in support of this claim, which were denied by De-

General Statutes Minnesota (1894).

Sec. 5194. "The summons must be subscribed by the plaintiff or his attorney, and directed to the defendant, requiring him to answer the complaint, and serve a copy of his answer on the person whose name is subscribed to the summons, at a place within the state therein specified, in which there is a post-office, within twenty days after the service of the summons, exclusive of the day of service."

Sec. 5354. "Judgment may be had, if the defendant fails to answer the complaint, as follows:

"First. When, in an action arising on contract for the payment of money only, the summons has been personally served, and the plaintiff shall file with the clerk proof of personal service of the summons, and that no answer has been received * * * the clerk shall thereupon enter judgment for the amount mentioned in the summons. * * * In other actions for the recovery of money only, on filing the like proof, the plaintiff may apply to the court for a reference, to have his

fendant in Error, who seasonably moved the Federal Court under the Statutes to remand the cause to the State Court for trial.

After argument and full consideration of the questions raised by the petition of Plaintiff in Error, and the opposing affidavits, the United States Circuit Court ordered the cause remanded to the Ramsey County District Court which remand was *"immediately carried into execution"* under 25 Stats. 433.

After the cause was returned to the State Court under the remanding order, the receivers defaulted, and allowed the time which by the practice acts of Minnesota they were required to appear and plead to expire, without answering Smithson's complaint, upon such default, unless relieved therefrom, there was nothing—so far as Receivers were concerned to do, but have a referee appointed and judgment ordered, or entered by the Court without referee.

General Statutes of Minnesota, 1894.

Sec. 53, Chap. 66, Gen. Statutes 1878.

Sec. 210, Chap. 66, Gen. Statutes 1878.

Sec. 5194, Statutes 1894.

Sec. 5354, Statutes 1894.

After the Receivers had remained in default for several months it seems that they desired to answer and were willing to waive jurisdictional questions, and try the case on their part in the State Court to which it had been remanded, and in conformity with this view they made a stipulation with Defendant in Error, wherein after reciting that

they (the Receivers) "had not answered and are in default of an answer. Now, in consideration that plaintiff (Smithson) allow said defendants (Plaintiffs in Error), Receivers to serve an answer herein said defendants * * * hereby stipulate that the plaintiff (Defendant in Error), *shall have a trial of this cause in said court.* (Ramsey County State Court) at the June Term thereof, 1896, so far as defendants (Receivers) are concerned, and in case of a final judgment in favor of said plaintiff (Defendant in Error) against said Receivers, that the Receivers will not oppose the allowance of the same before the Master in Chancery."

Transcript of Record, pages 25-26.

The plaintiffs in error availed themselves of the privilege thus granted of opening the default, duly answered, but after having answered upon the condition that Smithson so far as they were concerned should "have a trial" in the State Court, has contested and denied that right ever since. In the meanwhile and at all times its co-defendant, the Great Western Company contented with the jurisdiction of the State Court contested its substantial rights therein without remonstrance or objection.

When the case was finally reached for trial, plaintiffs in error offered to file an amended answer, setting forth, in addition to its first answer, (interposed after the stipulation), that "this Court is wholly without jurisdiction to hear, try and determine the matters at issue in this action for the reason that the matter has heretofore been properly removed to, and is now only properly and lawfully

pending in the Circuit Court of the United States for the District of Minnesota."

Transcript of record, pages 26-41.

In passing—as a pertinent part of the statement of the issues—the concession in Plaintiff's brief should be noted, viz.:

"However the remanding order was probably final so far as the first petition was concerned" citing

Mo. Pac. Ry. Co. v. Fitzgerald, 160 U. S. 556.
Powers v. C. & O. Ry. Co., 169 U. S. 92.
Brief of Plaintiff in Error, page 6.

The motion to amend by inserting the denial of jurisdiction in the State Court was refused (rightly according to concession in brief of opposite counsel) and the two railroad companies proceeded simultaneously to contest the right to recovery by Defendant in Error against each or either, as the record shows with all the arts and ability—usual in cases where a verdict is sought in an action against co-defendants jointly charged with negligence.

At the close of the testimony when the several parties had *closed and rested*, the trial court heard a motion from each of the railroad companies for an instruction to the jury to find in its favor.

Transcript of Record, pages 107-108.

The motion was granted in favor of the Great Western Company but refused as to the Receivers, and upon the charge of the Court as between the Defendant in Error and Receivers, his right to re-

cover was duly submitted, before the final instructions of the court were given the same petition and bond originally offered by which the removal was made were again offered to the Court who declined to consider them but proceeded as above set forth.

Transcript of Record, pages 108-109.

And a verdict was rendered in favor of Defendant in Error and against the Receivers which was affirmed in the Supreme Court of Minnesota.

Transcript of Record, pages 123-129.

While an exception was entered by the Receivers to the order of the Court directing a verdict for the Great Western Company, it does not appear that any judgment has been entered upon such order nor that any review has been asked in the Appellate Court of Minnesota, nor does it appear that any steps were taken in the Federal Court of the District of that state upon the last application for removal, nothing in fact has been done by the Receivers in either case.

Of course it goes mainly upon its bare statement that if the Courts of Minnesota had the right to try the case as against both the defendant parties in the courts of that state, the final judgment of its Supreme Court is valid and should not be interferred with by this court, hence the controversy here seems to involve three considerations, viz.:

1. The effect of the order of the Federal Court remanding the case to the District Court of Ramsey County for trial.

2. The agreement in writing securing relief

from the default of Plaintiffs in Error, that Defendant in Error *should have* a trial in the State Court and

3. The effect of the last effort to remove the cause during the trial.

While it is not contended that, upon the complaint, a cause of action is not stated against both companies, notwithstanding the decision of the Federal Court when it remanded the case that the joinder was not so fraudulent as to defeat Federal jurisdiction, it seems to be inferred or hinted that the Great Western was essentially not a real party for the purpose of forsensic controversy; such inferences are opposed to the facts either upon the pleading of the party who brought the suit or the evidence introduced upon the trial to support the same, a brief examination of the facts in this respect will disclose a real *bona fide* contest on the part of Defendant in Error against both companies as well as an entire absence of any possible defence upon the merits on the part of the receivers.

STATEMENT OF ISSUES IN STATE COURT.

The issues as presented in the complaint of Smithson, as well as the substantial facts to support its allegations have been so clearly stated by Mr. Justice Collins in the opinion of the Supreme Court of Minnesota, that it is best to adopt such statement for the purpose of this review, particularly since the statement of the learned judge who delivered such opinion does not seem to be questioned in any respect.

"Action for personal injuries received by plaintiff while he was serving defendant, Chicago Great Western Railway Company, as a locomotive fireman, and in a collision between the locomotive on which plaintiff was at work and another operated by defendants Whitcomb and Morris, as receivers, under appointment by the United States Circuit Court, of the Wisconsin Central Railway Company. It was alleged in the complaint that both of these defendants operated locomotives and trains over about four miles of track owned by the Chicago & Northern Pacific Railway Company, in the city of Chicago, and it was on this piece of track that the collision occurred. The negligence alleged on the part of the receivers was in allowing their locomotive to stop and remain standing in the night-time at a certain place on their track, and when there was imminent danger of a collision, without giving proper or any signals of having so stopped; while the negligence on the part of the Chicago Great Western Company was alleged to be an omission and failure on its part to adopt or establish proper or any rules for the giving of warning signals by its own or other locomotives or trains while being operated on said track."

Transcript of Record page 125.

"We have stated that the accident occurred upon the track of another company, in the city of Chicago. This company leased the use of its two tracks, one for outgoing, the other for incoming trains, to these defendants, from what was known as the 'Robey Street round house' to the vicinity of Forest Home. Both defendants used this round house, and plaintiff worked upon a freight locomotive which usually left the round house about 8:20 p. m., and, taking the train crew, ran out to the yard, about three miles, where it coupled on to its train and proceeded westerly. A freight locomotive, operated by defendant receivers, usually left the round house 15 or 20 minutes later, and, running over the same track, took up its train at the receiver's freight yard, in the same vicinity. On the night in question the locomotive on which plain-

tiff worked was delayed in starting because of the non-appearance of a brakeman and, at the request of the engineer, who was employed by the receivers, his locomotive was given the right of way. After it had been gone about 20 minutes the locomotive on which plaintiff worked started. When it reached a point near Forty-eighth Street it ran into the other locomotive, and plaintiff received a severe injury. It appears from the evidence that, when the receivers' locomotive reached a point on the main track about opposite the caboose of the train it was to haul out, which was upon a paralleling yard track, it was stopped, and there remained long enough for the other locomotive to run into it. The sole purpose of stopping at this point seems to have been to afford some of the trainmen an opportunity to transfer a large dog from the cab of the locomotive, where it had been riding, to the caboose of the train. There was one red light upon the rear of the tender of the receivers' locomotive, but this was not seen by the men on the other locomotive until it was too late to avert the collision. While stopping, the men operating the locomotive in advance had taken no precautions whatsoever towards protecting themselves from collision. It also appeared from the evidence that the railway company owning these tracks had promulgated and put in force a number of rules for the government of all trainmen while using or occupying these tracks. Several of these rules were applicable to a locomotive or train stopped upon the main track outside of station grounds, and No. 127 was in these words: "Inasmuch as trains may be expected at any time to be entering the yards or sidings, or to stop at any point without reference to schedules, and as switches are constantly in use, engineers or conductors running trains or engines between Chicago and Central Avenue must at all times so control their trains or engines as to be able to stop within the range within which an obstruction of the track and the position of switches can be plainly seen; but nothing in this will be held as an excuse for the failure to display proper signals when trains or engines are held on the main track, and men in

charge of trains or engines when in danger of being overtaken by another train, must protect themselves by flags, lamps, fusees, or torpedoes, promptly, to avoid all possibility of being run into."

Transcript of Record, pages 126-127.

In addition to the facts above stated it appears from the record that the numerous engines of these companies, the two defendants above, as well as those of the terminal company occupied a round-house near the main tracks over which they were all to pass, without being scheduled, or without rules or time positively fixed for their departure respectively, in fact the only rules for the regulation of the departure and movement of engines leaving the Robey Street round house were those provided by the Terminal Company, that the company employing Smithson had no rules or regulations regarding the movement of engines at the place where he was injured. The Terminal Company adopted all the rules controlling the matter.

Transcript of Record, pages 105-107.

And it also appeared in evidence that the injured party had never been furnished or put in possession with the rules of the Terminal Company which it is claimed were adopted by his employer, The Chicago Great Western Company.

Transcript of Record, p. 55.

It is contended in behalf of the defendant in error upon the record:

1. That the remanding order was final.
2. That the Plaintiff in Error is barred by its

own agreement from objecting to the jurisdiction of the State Court.

3. That the petition and bond filed at the close of the testimony did not deprive the State Court of the right to go on with the case.

I.

The Remanding Order Was Final.

The removal of cases from State to Federal Courts has been from time to time a matter of consideration by congress and has finally been completely considered and disposed of in the most comprehensive terms.

> "Whenever any cause shall be removed from any State Court into any Circuit Court of the United States, and the Circuit Court shall decide that the cause was improperly removed and order the same to be remanded to the State Court from whence it came, such remand shall be immediately carried into execution, and no appeal nor writ of error from the decision of the Circuit Court so remanding such cause shall be allowed."
>
> Supt. to Revised Statutes of United States 1874-1891, pages 611-614, 25 Stats. 433.

It will be seen that this provision of the law is conclusive, makes no distinction whatever as to the character of the defendants whether the same be individuals or corporations, but embraces all cases wherein a controversy may arise between the State and the Federal judiciary, upon the right to hear and determine the cause and substantially declares that the judgment or order of the Federal Court remanding the cause shall be final in every case.

The authoritive evolution of the law by the Federal Court of last resort recognizes the full force of the Statute referred to and the conclusions we have drawn as to its undoubted meaning and application.

Morey v. Lochart, 123 U. S. 56, 58.

Wilkenson v. Nebraska et al., 123 U. S. 286-7-8.

Sherman v. Grinnell, 123 U. S. 679-80.

Railway Companies v. Thouron, 134 U. S. 45 to 67.

Gurnee v. Patrick County, 137 U. S. 141-4-5.

Arrowsmith v. Harmoning, 118 U. S. 194.

Church v. Kelsey, 121 U. S. 282 and subsequent cases.

Chanute City v. Trader, 132 U. S. 210.

Richardson v. R. R. Co., 169 U. S. 128.

In re. Penn. Co. Petr., 137 U. S. 451 to 458.

Missouri Pacific v. Fitzgerald, 160 U. S. 556 to 581.

And the reason for this rule of final determination is stated in the last authority cited to be "to contract the jurisdiction of the Federal Courts."

Missouri Pacific v. Fitzgerald, supra.

The conclusions from these authorities as to the present status of the question of jurisdiction, are summed up in the following language:

"If the Circuit Court and the State Court go to judgment respectively, each judgment is opened to revision in the appropriate mode."

The Removal Cases, 100 U. S. 457.

"But if the Circuit Court remands a cause and

the State Court thereupon proceeds to final judgment, the action of the Circuit Court is not reviewable on writ of error to such judgment. A State Court cannot be held to have decided against a Federal right when it is the Circuit Court, and not the State Court, which has denied its possession. The Supreme Court of Nebraska rightly recognized the courts of the U. S. to be exclusive judges of their own jurisdiction, and declined to review the order of the Circuit Court."

Missouri Pacific v. Fitzgerald, Supra 528.

The above statement of principle and collation of authority is repeated from the brief previously filed on the motion to affirm for the purpose of continuity in the presentation of our views.

In addition to the proposition contended for it may be added that so far as the main point that the order of the Federal Court remanding the cause was effective is concerned, it seems now to be conceded by the learned counsel for plaintiff in error. His brief filed, admits that under the rule in Missouri Pacific v. Fitzgerald the order to remove was effective to transfer the cause back to the trial court of Ramsey County and to give it jurisdiction to finally hear and determine the cause.

Brief for Plaintiff in Error, p. 6.

In leaving this point it might be well to add that the Supreme Court of Minnesota did not seem to have been misled on the subject disposed of by this court, but gave it its adherence in that respect.

Tilley v. Cobb, 56 Minn. 295-299.

Roberts v. Railway, 48 Minn. 521.

Smithson v. Chicago Great Western Co., 71 Minn. 216.

II.

Plaintiff in Error is Barred by its Agreement From Objecting to the Judgment of the State Court.

The stipulation to which reference has been made, providing its terms are sufficient to amount to a waiver by the Receivers, was within their authority, and they undoubtedly could, by their consent, assent to a trial of the cause in the state tribunal.

This principle is so clearly announced by that eminent jurist, Judge Dillon, and his reasons are so cogent that it is not possible to state the rule governing in such cases better than by using his language.

"A party to a suit in a State Court, may, so far as concerns that particular litigation, waive his right to remove the same to the Federal Court. Such waiver touches no question of public policy its effectiveness stands upon the maxim that any man may renounce a legal right which is conferred *only for his own advantage*. And he may make such waiver, after the suit is brought, not only by a stipulation or agreement, but by conduct which is equivalent to a waiver."

Black's Dillon on Removal, page 20, Sec. 15.

Hanover Nat. Bank v. Smith, 13 Blatchf. 224; Fed. Case No. 6035.

Wadleigh v. Standard Ins. Co., 76 Wis. 439; 45 N. W. 109.

Home Ins. Co. v. Curtis, 32 Mich. 402.

Evans v. Smith, 21 Fed. 1.

First Nat. Bank v. Conway, 67 Wis. 210; 30 N. W. 215.

Hudson River Co. v. Day, 54 Fed. 545.

Amy v. Manning, 144 Mass. 153.

Thus the postulate of the Supreme Court of Minnesota (in this case): "That a defendant who is entitled to have a case removed from a state to a Federal Court, or from the latter to the former, there being no question of jurisdiction over the subject matter, or over the parties, may waive his rights to insist upon a removal by his acts or omissions, (Record, page 126) finds the highest support and is indeed obvious, in the very nature of the relations that exists between the State and Federal jurisdiction and the co-ordinate powers of each.

If the proposition be established that the receivers could consent to waive any right to review or consent to the right of the State Court to try the cause so that its judgment would bar their power to question its jurisdiction, the only remaining controversy possible is whether by their stipulation they did so.

The construction of this stipulation has been made the subject of some comment, learned counsel attempts to eliminate from it all essence of consent to jurisdiction of the State Court by what is claimed to be a reading that treats it as if it were merely a provision that if the case was to be tried it should be at a particular term of court, but the agreement goes further, it provides that plaintiff (Smithson) "*shall have a trial* in said court," the time is, of course, not controlled by the Receivers, for it is further provided, so far as the Receivers "Whitcomb and Morris are concerned" and that there might be no mistake as to results, that the pay-

ment of the final judgment by the "Master in Chancery would not be opposed."

It will be remembered that this stipulation was given to relieve a default of several months—had such default not been relieved either by counsel or court, how would it have been possible to contend against the jurisdiction of the State Court to which this cause had been remanded. The law seems to be clear that the removal was *res judicata.*

See authorities cited under part 1.

The palpable effect of which is admitted now by learned counsel on the other side as we have seen, and so far as the practice acts of Minnesota effected this matter, the receivers had no standing, they were out of court, their delay after knowledge of the proceedings was inexcusable, they could not have obtained relief from their default by neglect to answer upon any ground of right. Such relief must, therefore, come from a concession of opposing counsel, and it was agreed upon the expressed consideration that the plaintiff should "have a trial in the State Court," etc., and that no opposition should be made to allowance, etc., of the judgment, there can not be read into this agreement a reservation that as soon as the receivers could answer they should answer the complaint and thereafter dispute the right of the State Court to try the cause."

The disposition of this part of the dispute over the jurisdiction of our State Court, is disposed of by the Minnesota Supreme Court in the following unanswerable manner: "Through this agreement,

they (receivers) secured a substantial right, the right to answer, if prior to that time, there had been *a real controversy* over the receivers' right to have the cause tried in the Federal Court, it was then and there settled by a formal stipulation deliberately entered into by counsel which they must abide by, and which will be enforced by the courts, in the interest of fair dealing and professional good morals."

Opinion of Justice Collins, Transcript of Record, page 126.

III.

THAT THE PETITION AND BOND FILED AT THE CLOSE OF THE TRIAL DID NOT DEPRIVE THE STATE COURT OF THE RIGHT TO GO ON TO FINAL JUDGMENT.

If the second petition and bond filed at the close of the evidence were efficient to remove the cause at the time they were filed, it must be conceeded that up to the moment they were filed the State Court then engaged in the trial of the cause, had plenary jurisdiction not only over the subject matter but over the parties as well, and if the contention of counsel, that the petition then filed deprived the court of jurisdiction at that time be well taken the act of Congress which gives to the remanding order its ultimate and conclusive force, only means that the order shall be "immediately carried into execution," to be continued in effect only so long as the State Court retains control of all the parties.

If the State Court were to have jurisdiction only so long as it should continue control of all the parties its jurisdiction would be emasculated of that virile essential element of all judicial power *freedom of action,* without which the right to *hear and determine* a cause would be a farce, and "due process of law" in a State Court would be handicapped by uncertain conditions impossible to carry out in the ordinary course of justice between the state and federal jurisdictions, for instance the ruling in this case was by the Court, it might be right, and it might not be, the ruling of the State trial court upon this matter was reviewable. It was an instruction upon which either the co-defendant or Receivers could appeal and appeal to the Supreme Court of that state.

If this order, during the trial which might be reviewed, would immediately authorize a removal and this without restriction as to any formal rule regarding the time within which the petition should be interposed, then of course the whole case must be transferred with all defendants to the Federal Court who could and might again remand to the State Court. In the meantime what would be done with so much of the case as had been tried and so much as had not been heard. Would the part rightly in the state court have to be again heard with other contingencies easily supposed but impossible of execution in the orderly course of justice, and during all this time what would be done with the jury rightly called to determine the case in the State Court at a time when such court concededly had the

right to try and determine it or supposing that the court of review in Minnesota should say upon an appeal, which would be necessary to make the order of the trial court final, that the instruction taking the case from the jury as to the Great Western Company was wrong, and that the trial court must submit the right to recover against both companies to the jury, retaining the relation of both parties to the case, what then? No one can tell.

This last supposition is clearly not improbable upon the record in this case.

The trial Court was of the opinion that the rules adopted by the Terminal Company were sufficient, we think upon the evidence that the duty of the master in a complicated and dangerous business to establish rules for his servants and that whether the master has done so in a given case is a question for the jury is too well settled upon reason and authority to admit of doubt.

Abel v. Priests, etc. of Deleware, etc. Canal Co., 103 N. Y. 581.

Sheehan v. New York, etc., R. Co., 91 N. Y. 332.

Lake Shore etc. R. Co. v. Lavalley, 36 Ohio St. 221.

Vose v. Lancashire R. Co., 2 Hurl. & N. 728.

Regan v. St. Louis etc. R. Co., 93 Mo. 348.

Luebke v. Chicago etc. R. Co., 59 Wis. 127.

Missouri Pac. R. Co. v. Watts, 63 Tex. 549.

Gulf etc. R. Co. v. Ryan, 69 Tex. 665.

Gardner v. Michigan etc. R. Co., 58 Mich. 584.

Wolsey v. Lake Shore etc. R. Co., 33 Ohio St. 227.

Hayes v. Bush, etc. Mfg. Co., 41 Hun. (N. Y.) 407.
Pilkinton v. Gulf etc. R. Co., 70 Tex. 226.
Alexander v. Louisville etc. R. Co., 83 Ky. 590.
Baltimore etc. R. Co. v. Kean, 65 Md. 394.
Pringle v. Chicago etc. R. Co., 64 Iowa 613.
Central Railroad v. Mitchell, 63 Ga. 173.
Ford v. Fitchburgh etc. R. Co., 110 Mass. 240.
Thomas v. Memphis R. Co., 51 Miss. 637.
Covey v. Hannibal etc. R. Co., 27 Mo. App. 170.

While the merits of this controversy are not perhaps reviewable on this hearing, yet it is to be noted that in a difficult situation where the utmost precaution relating to the movements of engines was required, Smithson's employer made no rules whatever but adopted those of the terminal company and the Terminal Company provided certain rules for the giving of signals but did not require each engine in the yard to have sufficient lights upon the tender as warning to the engine that might be following the engine running ahead, and if the receivers as well as the Great Western Company were to adopt the rules of the Terminal Company so that the rules adopted would become their own, it would seem to have been the right of Smithson to rely upon some such rule. As this is an indication to show a provision that might have avoided the accident and was within the consideration of the jury, more in the record might be suggested for such consideration in view of the necessity of active progress in hazardous and difficult situations such

as were likely to rise in the business between the Terminal Company and its lessees.

To conclude, it is urged that the case of Powers v. Chesapeake & Ohio Ry. Co., 196 U. S. 92, is an authority in favor of the right of the receivers to have had the cause removed during the pendency of the trial. We do not assent to this.

The facts in the Powers case as disclosed by the opinion of the court show that before the beginning of the trial the plaintiff had dismissed as to one of the defendants, thus removing the element of *non consent* upon which the case had been remanded, and practically commenced a new action so far as the jurisdictional element was concerned, and opposing no objection to the removal at that time except the question of time which the court held in Ayers v. Watson, 113 U. S. 594 was but *"modal* and *formal"* and the same question of time was "when necessary to carry out the purpose of the statute, must yield to the principal enactment as to the rights."

It would seem hardly worth discussion to claim that when a court without the consent of the interested party had entered upon the actual trial of the case that the existence of its jurisdiction was more than merely a *"modal or formal"* element, that it was vital and that the trial of a case in a State Court having jurisdiction, is not subject to interruptions calculated to destroy the effect of any trial in the exercise of its undoubted prerogatives to decide between both of the parties or per-

chance against either. In such a case, it would seem to follow in the language of a learned Federal Judge "That ultimately it may turn out that one (of the parties) is not liable at all and the other exclusively so, *is a question on the merits and does not effect the jurisdiction.*"

Arrowsmith v. Nashville Railroad Co., 57 Fed. 169.

It is respectfully submitted that the judgment of the Supreme Court of the State of Minnesota should be affirmed.

John A. Lovely

Attorney for Defendant in Error.

WHITCOMB *v.* SMITHSON.

ERROR TO THE SUPREME COURT OF THE STATE OF MINNESOTA.

No. 150. Submitted December 4, 1899. — Decided January 8, 1900.

On the facts, as stated below, it is *held* that the action of the Circuit Court in remanding the cause after its removal on the first application is not open to revision on this writ of error; and that, as the state court did not err in denying the second application, the motion to affirm must be sustained, as the question of the effect of that remanding order gave color for the motion to dismiss.

THIS was an action brought in the District Court of Ramsay County, Minnesota, by John A. Smithson against the Chicago Great Western Railway Company, and H. F. Whitcomb and Howard Morris, receivers of the Wisconsin Central Company, to recover for personal injuries while he was serving the Chicago Great Western Railway Company as a locomotive fireman, in a collision between the locomotive on which he was at work and another locomotive operated by Whitcomb and Morris, as receivers of the Wisconsin Railway Company, appointed by the United States Circuit Courts for the Eastern District of Wisconsin and the District of Minnesota. The Chicago Great Western Railway Company answered the complaint, and the receivers filed a petition for the removal of the cause into the Circuit Court of the United States for the Dis-

trict of Minnesota setting up diverse citizenship, and that they were officers of the United States courts; that the controversy was separable, and that the railway company was fraudulently made a party for the sole purpose of preventing the removal of the cause. Plaintiff answered the petition and asserted that the company was made party defendant in good faith, and not for that purpose. An order of removal was entered and the cause sent to the Circuit Court, and thereafterwards that court, on hearing on rule to show cause, remanded it to the District Court of Ramsay County. Defendants Whitcomb and Morris being in default, it was stipulated between plaintiff and themselves that in consideration that plaintiff allowed them to answer, plaintiff should have a trial of the cause at the June term, 1896, of the court, and further "in case of a final judgment in said action in favor of said plaintiff against said receivers, that the receivers will not oppose the allowance of the same before the master in chancery." Whitcomb and Morris thereupon filed their answer.

The case came on for trial on the morning of April 20, 1897, when Whitcomb and Morris asked leave to file an amended answer, setting up that the court was without jurisdiction because the cause was pending in the Circuit Court. The application was denied, and said defendants excepted. The trial proceeded, and after the testimony was closed, on April 21, counsel for the Chicago Great Western Railway Company moved that the jury be instructed to return a verdict in behalf of that defendant, which motion the court granted. Thereupon the receivers asked permission to file a petition for removal supplemental to the petition already on file, and proffer of petition and bond being treated as made, the court denied the application, and exception was taken. On the morning of April 22 the court instructed the jury to return a verdict in favor of the Chicago Great Western Railway Company, which was done, and thereupon the case went to the jury, which returned a verdict on April 23 against Whitcomb and Morris as receivers, and assessed plaintiff's damages. Motion for new trial having been made and overruled, judgment was entered on the verdict, and was subsequently affirmed

by the Supreme Court of Minnesota on appeal. 71 Minnesota, 216. The pending writ of error having been issued, motions to dismiss or affirm were submitted.

Mr. John A. Lovely for the motions.

Mr. Howard Morris and *Mr. Thomas H. Gill* opposing.

Mr. Chief Justice Fuller, after stating the case, delivered the opinion of the court.

The action of the Circuit Court in remanding the cause after its removal on the first application is not open to revision on this writ of error. *Missouri Pacific Railway* v. *Fitzgerald*, 160 U. S. 556. And if the state court did not err in denying the second application, the motion to affirm must be sustained, as we think the question of the effect of that remanding order gave color for the motion to dismiss.

The record shows that the Circuit Court granted the motion to remand on the authority of *Thompson* v. *Chicago, St. Paul &c. Railway*, 60 Fed. Rep. 773, in which case it was ruled that there was no separable controversy; and its judgment covered the question of fact as to the good faith of the joinder. The contention here is that when the trial court determined to direct a verdict in favor of the Chicago Great Western Railway Company, the result was that the case stood as if the receivers had been sole defendants, and that they then acquired a right of removal which was not concluded by the previous action of the Circuit Court. This might have been so if when the cause was called for trial in the state court plaintiff had discontinued his action against the railway company, and thereby elected to prosecute it against the receivers solely, instead of prosecuting it on the joint cause of action set up in the complaint against all the defendants. *Powers* v. *Chesapeake & Ohio Railway*, 169 U. S. 92. But that is not this case. The joint liability was insisted on here to the close of the trial, and the non-liability of the railway company was ruled *in invitum*.

As stated by the Supreme Court of Minnesota, "it was alleged in the complaint that both of these defendants operated locomotives and trains over tracks owned by the Chicago and Northern Pacific Railway Company, in the city of Chicago, and it was on this track that the collision occurred. The negligence alleged on the part of the receivers was in allowing their locomotive to stop and remain standing in the night time at a certain place on their track, and when there was imminent danger of a collision, without giving proper or any signals of having so stopped; while the negligence on the part of the Chicago Great Western Company was alleged to be an omission and failure on its part to adopt or establish proper or any rules for the giving of warning signals by its own or other locomotives or trains while being operated on said track." The case was prosecuted by plaintiff accordingly, and at the close of the evidence a motion was made to instruct the jury to return a verdict in behalf of the railway company because the evidence did not sustain the allegations of the complaint as to the negligence of that defendant, and the court granted the motion on that ground in view of the rules of the company, which it found "to amply cover all the contingencies arising in the prosecution of the various duties incident to railroad service at the point."

This was a ruling on the merits, and not a ruling on the question of jurisdiction. It was adverse to plaintiff, and without his assent, and the trial court rightly held that it did not operate to make the cause then removable and thereby to enable the other defendants to prevent plaintiff from taking a verdict against them. The right to remove was not contingent on the aspect the case may have assumed on the facts developed on the merits of the issues tried. As we have said the contention that the railway company was fraudulently joined as a defendant had been disposed of by the Circuit Court. But assuming, without deciding, that that contention could have been properly renewed under the circumstances, it is sufficient to say that the record before us does not sustain it.

Judgment affirmed.